IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

v.

UNITED TRANSPORTATION UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO AND NORTH WESTERN
RAILWAY COMPANY, a corporation,

Plaintiff,

vs.

Civil Action
No. 69-C-2401

UNITED TRANSPORTATION UNION,
a voluntary association,

Defendant.

DOCKET ENTRIES

11-19-69 - Defendant temporary restrained. Plaintiff's bond fixed at $5,000.00. Defendant to show cause at 2 p.m. on November 28, 1969 why plaintiffs motion for preliminary injunction should not be granted etc. - DRAFT-Perry, J. Mailed Notice 11-20-69

11-20-69 - Filed Verified complaint and 4 copies

11-20-69 - Filed Bond as security for restraining order

11-20-69 - Filed Designation of case

11-20-69 - Filed 2 affidavits pursuant to G.R. 39 by attorneys for plaintiff

11-20-69 - Filed Affidavit of James E. Wolfe on behalf of Chicago and North Western Railway Company

11-20-69 - Filed Affidavit of James R. Wolfe on behalf of Chicago and North Western Railway Company

11-20-69 - Filed Affidavit of Larry S. Provo on behalf of the plaintiff, Chicago and North Western Railway Company

11-20-69 - Filed Motion of plaintiff for preliminary injunction

11-20-69 - Filed Motion of Plaintiff for temporary restraining order

11-20-69 - Issued summons and 4 copies with 4 copies of complaint.

11-21-69 - Filed appearance of defendant and that of its attorney.

11-21-69 - Filed affidavit under Rule 39.

11-25-69 - Filed Notice, Defendant's motion to vacate temporary restraining order and affidavit of Francis D. Tuffley.

11-25-69 - Filed Plaintiff Carrier's memorandum in support of its motion for preliminary injunction.

11-25-69 - Filed Carrier's memorandum in opposition to defendant's motion to vacate temporary restraining order.

11-25-69 - Filed Affidavit pursuant to G.R. 39 by attorney for defendant.

11-25-69 - Motion to vacate temporary restraining order argued in part for the defendant and continued to 2 p.m. on 12-2-69 - Perry, J. Mailed notice 11-26-69.

11-28-69 - Defendants show cause why plaintiffs motion for preliminary injunction should not be granted continued to 12-2-69 at 2 p.m. Order temporary restraining order extended in full force and effect to and including 12-6-69 at midnight - Perry, J. Mailed Notice 11-28-69.

12-1-69 - Filed Amendment to verified complaint.

12-2-69 - Filed defendant's verified answer to verified complaint.

12-2-69 - Filed defendant's memorandum.

11-25-69 - Order cause referred to the Executive Committee for reassignment to the calendar of Judge Perry, who has agreed to accept, same, if Judge Hoffman agrees to the transfer and acceptance of another case from Judge Perry's calendar. The parties have agreed and consented in open court to such reassignment for the reason that it is an emer-

gency matter requiring an early hearing and Judge Hoffman would not be able to entertain an early hearing because of pressure of other matters requiring his attention, now pending on his calendar. PERRY, J. Mld Notices 12-3-69.

11-25-69 - IT IS ORDERED that the above entitled cause be, and the same is hereby reassigned to Judge PERRY. The Executive Committee. (DRAFT). Mld Notices 12-3-69.

12-2-69 - Evidence heard in part for plaintiff on its motion for a preliminary injunction and continued to December 3, 1969 at 1:30 P.M. Motion of defendants to vacate restraining order continued to December 3, 1969. PERRY, J. Mld Notices 12-3-69.

12-3-69 - Further evidence heard for the plaintiff and cause continued to December 4, 1969 - Perry, J.

12-4-69 - Further evidence heard for the plaintiff and cause continued to December 5, 1969 - Perry, J. Mailed Notice 12-8-69 (2 orders).

12-5-69 - Filed Carrier's reply memorandum.

12-5-69 - Further evidence heard for the plaintiff and plaintiff rests. Motion defendants to deny preliminary injunction argued. Cause continued to 12-11-69 at 2 p.m. for entry of findings of fact, conclusions of law and judgment order - Restraining order continued in full force and effect to 6 p.m. 12-12-69 - Perry, J. Mailed Notice 12-9-69.

12-11-69 - Filed bond as security for injunction pending appeal.

12-11-69 - Filed plaintiff's motion for injunction pending appeal.

12-11-69 - Filed memorandum in support of plaintiff's motion for an injunction pending appeal.

12-11-69 - Enter findings of fact and conclusions of law. Order defendants motion to vacate temporary restraining

order issued November 19, 1969 denied. Plaintiff's motion for preliminary injunction denied. Order plaintiff to recompense defendants, etc. Complaint dismissed at plaintiff's cost. (DRAFT) Defendant enjoined pending appeal and bond fixed at $25,000.00. (DRAFT) Plaintiff's bond in the amount of $25,000.00 approved and filed. - Perry J. Mailed notices 12-12-69

12-11-69 - Filed plaintiff's notice of appeal.

12-12-69 - Mailed copy to defendant's attorneys.

12-12-69 - Filed defendant's notice of appeal.

12-12-69 - Filed defendant's request for short record on appeal.

12-12-69 - Mailed copy of notices of appeal to plaintiff's attorneys.

12-12-69 - Clerk's File Copy of Transcripts of proceedings had before Judge Perry on November 25, December 2, 3,4,5, and 11, 1969 filed by Official Court Reporter., (6 volumes)

12-15-69 - Certified and transmitted to U.S.C.A., 7th Circuit, short record on appeal as requested by defendant-appellant.

12-18-69 - Filed Bond on Appeal.

12-24-69 - Filed plaintiff-appellant's request for complete record on appeal.

12-26-69 - Filed plaintiff's exhibits 1 through 25.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

VERIFIED COMPLAINT

Now comes the plaintiff, Chicago and North Western Railway Company, a corporation, by its attorneys, James P. Daley, Robert Schmiege, William H. Dempsey, Jr., and David Booth Beers, and for its cause of action against the defendant, United Transportation Union, an unincorporated association, states:

1. This action arises under the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. §§ 151-160. The jurisdiction of this Court is grounded upon 28 U.S.C. §§ 1331 and 1337. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of ten thousand dollars.

2. The plaintiff, Chicago and North Western Railway Company (hereinafter referred to as the "C&NW" or the "carrier"), is a corporation which is engaged in the transportation of freight and passengers by rail in interstate commerce and is a "carrier" as defined in Section 1 of the Railway Labor Act (45 U.S.C. § 151).

3. The defendant, United Transportation Union (hereinafter referred to as the "UTU" or the "organization") is an unincorporated voluntary association and a labor organization with an office and place of business at 120 West Madison Street, Chicago, Illinois, which represents for purposes of collective bargaining under the Railway Labor Act certain of the plaintiff's employees. The defendant, UTU, is the successor organization to four other labor organizations, including the former Brotherhood of Railroad Trainmen (hereinafter referred to as the "BRT").

4. On July 3, 6 and 7, 1965, the BRT served upon the plaintiff notices proposing changes in the existing collective bargaining agreements between the carrier and the organization. The notices were purportedly served under Section 6 of the Railway Labor Act (45 U.S.C. § 156), and in com-

bination they proposed a rule, to be effective January 26, 1966, requiring a minimum crew consist of one conductor (or foreman) and two trainmen (or helpers) in most classes of service on the carrier, and a minimum crew consist of one conductor and three brakemen in a few other classes of service on the carrier. These notices were similar to notices served by the BRT upon more than eighty other railroads at or about the same time. On December 24, 1965, the plaintiff served upon the BRT counter-notices under Section 6 of that Act, proposing the elimination of existing crew consist rules and the creation of a new rule giving management the right to determine crew size unilaterally in all classes of service. These counter-notices were similar to notices served upon the BRT by more than eighty other railroads at or about the same time.

5. The BRT notices and carrier counter-notices referred to in Paragraph 4 above were discussed by the parties in conferences held on the property of the carrier, but no agreements were reached. The dispute was also the subject of mediation under the auspices of the National Mediation Board. However, mediation failed to produce any agreements, and the Mediation Board urged the parties to submit the dispute to arbitration. When the BRT declined, on October 16, 1969, the Board terminated its services.

6. During the period of the dispute alleged in Paragraphs 4 and 5 above, the BRT was succeeded as an entity by the defendant, UTU, although the individual negotiators for the two organizations have for the most part been the same throughout, and the positions now taken in the dispute by the UTU are the same as those taken formerly by the BRT.

7. The UTU takes the position that from and after November 16, 1969, or thirty days after the termination of the Mediation Board's services in the dispute alleged in Paragraphs 4 and 5 above, the procedures of the Railway Labor Act for resolving disputes of the kind raised by the BRT's notices and the carrier's counter-notices have been exhausted. The UTU takes the further position that from and after November 16, 1969, it has been free to strike the

carrier if it does not accede to the organization's demands in this dispute.

8. The plaintiff disagrees with the position of the UTU set forth in Paragraph 7 above. The plaintiff takes the position that the UTU has not complied with the requirements of Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First) "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions" in the present dispute, in that:

First: Having insisted in the foregoing dispute upon bargaining separately with the plaintiff carrier instead of bargaining jointly with all the railroads upon which the BRT had served like notices, nevertheless

(a) The defendant has refused to bargain on the proposals in the carrier's counter-notices to reduce the size of main line road crews;

(b) The defendant has insisted that any agreement on the C&NW be no more favorable to the C&NW than agreements reached on the other railroads upon which the BRT served like notices;

(c) The defendant has entered negotiations with a fixed position and a determination not to deviate from the position regardless of what relevant consideration might be advanced by the C&NW; and

Second: Notwithstanding the foregoing, the defendant has refused to engage in national handling of this dispute and to negotiate on a joint basis a national crew consist agreement with all the railroads on which the BRT served like notices.

9. The UTU has threatened to strike the plaintiff. For the reasons set forth in Paragraph 8 above, this threatened strike of the carrier by the UTU is in violation of the Railway Labor Act.

10. If not enjoined by this Court the illegal strike alleged in Paragraph 9 above will cause great and irreparable injury to the plaintiff and to the public. The operation of the plaintiff will be brought to a virtual halt. The plaintiff

operates in eleven states, serving ten major cities; has 11,547 miles of track; interchanges with other railroads at some 230 points; transports over 4,000 loaded freight cars a day; serves about 20,000 industries, of which several hundred plants (including Chrysler Corporation at Belvidere, Illinois, American Motors Corporation at Kenosha, Wisconsin, Green Giant Company at Le Seuer, Minnesota, and Minnesota Mining & Manufacturing Company at St. Paul, Minnesota) depend entirely upon the plaintiff carrier for rail service; moves both munitions and defense equipment (providing the only rail service to Great Lakes Naval Training Station, Fort Sheridan Army Base, Box Elder Air Force Base, and Badger Ordnance Works); and provides service for about 90,000 passengers a day in its passenger service between Chicago, Illinois and its suburbs. Thus, a strike if not enjoined will greatly interfere with the transportation in interstate commerce of freight and passengers, including military personnel and material, and food and other lading essential to the public health and safety. Moreover, the plaintiff will be deprived of over $750,000 a day in operating revenues, will be unable to maintain or use its properties and equipment in which it has a substantial investment, will lose business permanently to competing forms of transportation, and will be unable to fulfill its obligations under the Interstate Commerce Act to serve the public. Finally, about 14,200 of the plaintiff's employees will be deprived of their positions and earnings for the duration of the strike.

WHEREFORE, the plaintiff prays that this Court (1) adjudge and declare that the procedures of the Railway Labor Act have not been exhausted with respect to the dispute alleged in this complaint and that the UTU has not been free to strike the plaintiff on or after November 16, 1969; (2) restrain and enjoin the UTU, its divisions, locals, officers, agents, employees, members and all persons acting in concert with them for authorizing or engaging in any strike against or picketing of the plaintiff in connection with the dispute alleged in this complaint; and (3) grant to the plaintiff its costs and such other relief as may be proper.

[subscriptions and verification omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

MOTION FOR TEMPORARY RESTRAINING ORDER

Now comes the plaintiff, Chicago and North Western Railway Company, by its attorneys, and moves the Court for a temporary restraining order, restraining the defendant, United Transportation Union, each of its divisions, lodges, officers, agents, servants, counsellors, members, and all persons acting by, through and for it, or on its behalf, from authorizing or engaging in any strike or picketing pending a hearing and determination of the plaintiff's motion for a preliminary injunction, for the reasons and upon the grounds that immediate and irreparable injury, loss, and damage will result to the plaintiff and to the public before a hearing can be had thereon, all as more particularly appears in the verified complaint herein, the Affidavit of James E. Wolfe, the Affidavit of James R. Wolfe, and the Affidavit of Larry S. Provo, all filed herewith.

[Subscriptions and verification omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

MOTION FOR PRELIMINARY INJUNCTION

Now comes the plaintiff, Chicago and North Western Railway Company, by its attorneys, and moves the Court for a preliminary injunction, enjoining the defendant, United Transportation Union, each of its divisions, lodges, officers, agents, servants, counsellors, members, and all persons acting by, through or for it, or on its behalf, from authorizing or engaging in any strike or picketing pending a final judgment on the merits of the plaintiff's complaint herein.

As is more fully set forth in the verified complaint herein, and in the affidavits of James E. Wolfe, James R. Wolfe,

and Larry S. Provo, all filed herewith, the grounds for this motion are as follows:

1. In 1965 and 1966 the parties exchanged bargaining notices served under Section 6 of the Railway Labor Act (45 U.S.C. § 156), each demanding new rules to govern the size or "consist" of crews on the plaintiff's system. The union proposed in general that all crews be operated with a minimum crew consist of one conductor and two brakemen in most classes of service and a minimum crew consist of one conductor and three brakemen on some crews in road service. The carrier's proposal was that existing crew consist rules be eliminated and that a new rule commit the matter of determining proper crew size to managerial discretion. Like notices were exchanged at about the same time by the union and more than eighty other railroads.

2. After conferences on the property of the carrier and mediation sessions under the auspices of the National Mediation Board had been conducted pursuant to Sections 5 and 6 of the Railway Labor Act (45 U.S.C. §§ 155, 156) without any agreements being reached, the Mediation Board urged the parties to settle the dispute by arbitration. When the union refused to arbitrate, the Mediation Board terminated its services on October 16, 1969.

3. The union has taken the position that from and after November 16, 1969–thirty days following the termination of the Mediation Board's services–the procedures of the Railway Labor Act for resolving disputes of this kind have been exhausted and that the union is therefore free to strike the carrier to enforce its demands.

4. The required procedures of the Railway Labor Act have not been exhausted with respect to this dispute, because the union has not complied with the requirements of Section 2 First of the Act (45 U.S.C. § 152 First) "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions" in that:

First: Having insisted in the foregoing dispute upon bargaining separately with the plaintiff carrier instead of bar-

gaining jointly with all the railroads upon which the BRT had served like notices, nevertheless

(a) The defendant has refused to bargain on the proposals in the carrier's counter-notices to reduce the size of main line road crews;

(b) The defendant has insisted that any agreement on the C&NW be no more favorable to the C&NW than agreements reached on the other railroads upon which the BRT served like notices;

(c) The defendant has entered negotiations with a fixed position and a determination not to deviate from the position regardless of what relevant considerations might be advanced by the C&NW; and

Second: Notwithstanding the foregoing, the defendant has refused to engage in national handling of this dispute and to negotiate on a joint basis a national crew consist agreement with all the railroads on which the BRT served like notices.

5. Under these circumstances the strike by the union in this dispute is in violation of the Railway Labor Act and will cause grave and irreparable injury to the plaintiff and to the public. It should therefore be enjoined.

[Subscriptions and verification omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

AFFIDAVIT OF JAMES E. WOLFE ON BEHALF OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY

James E. Wolfe, of full age, being duly sworn according to law, upon his oath deposes and says:

1. Prior to my retirement on July 31, 1967, I was the Chairman of the National Railway Labor Conference, which has since January 1, 1963, been the bargaining arm in national labor matters for most of the nation's railroads.

In that position I was the Chief Negotiator and Spokesman for the railroad industry in all national labor disputes. * * *

2. The issue of manning requirements on railroad freight and passenger trains and yard assignments—that is, the number of men needed to operate trains—has divided the nation's railroads and the unions representing their operating employees for many years. * * *

3. * * * In the 1950's trains were generally required to have a minimum crew consist of one conductor (sometimes called a "foreman" in yard service) and two or three trainmen or brakemen (sometimes called "helpers" in yard service). * * *

4. In this situation, substantially all the nation's railroads, on November 2, 1959, initiated steps for abolishing the long existing and obsolete crew consist rules, as well as a number of other work rules requiring inefficient use of manpower, by serving upon the five operating unions, including the Brotherhood of Railroad Trainmen (hereinafter referred to as the "BRT"), with bargaining notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156). (On January 1, 1969, the BRT was merged, together with three other unions, into the United Transportation Union. Throughout this affidavit, I use the term "BRT" for purposes of simplicity even where the events in question occurred after January 1, 1969.) With respect to the consist of train crews, the carriers in these notices proposed to establish a new national rule which in general would give to the carriers the right to determine the consist of train crews in most classes of train service.

5. The Chicago and North Western Railway Company (hereinafter referred to as the "C&NW") has participated in this dispute from its inception in 1959. Until 1963 the C&NW was represented through a Power of Attorney by the Western Carriers' Conference Committee. When the National Railway Labor Conference (hereinafter referred to as the "NRLC") was formed on January 1, 1963, the

C&NW was represented through a Power of Attorney by the Conference Committees and the NRLC.

6. In the months following the service of the November 2, 1959, notices, conferences to discuss these notices were held within the framework of the Railway Labor Act on the properties of the individual carriers. No agreements were reached, however. By letter of June 9, 1960, the chairmen of the Eastern, Southeastern, and Western Carriers' Conference Committees invited the chief executives of the five operating unions, including the BRT, to commence national negotiations "to deal concertedly with the Carriers' Conference Committees" on the subject of the notices. All the unions agreed, and meetings of national bargaining committees designated by the carriers and by the organizations were thus begun on June 9, 1960. They extended through October 17, 1960.

7. On September 7, 1960, the BRT and the four other operating unions served counter-notices upon most of the nation's railroads pursuant to Section 6 of the Railway Labor Act. The BRT and other organizations representing employees in train service (in contrast to engine service) proposed a new national rule which, in general, would require the use of not less than one conductor (or foreman) and two trainmen (or helpers) on virtually all crews in road and yard service.

8. * * * [O]n October 17, 1960, the chief executive officers of the five operating organizations and the chairmen of the Carriers' Conference Committees entered into an agreement requesting the President to establish a Presidential Railroad Commission to investigate and report the facts with respect to the controversy between the parties involving their respective Section 6 notices of November 2, 1959, and September 7, 1960. * * *

9. * * * [O]n November 1, 1960, President Eisenhower by Executive Order No. 10891 established a Presidential Railroad Commission * * *

10. * * * On February 28, 1962, the Commission delivered a comprehensive report of its findings and recommendations to President Kennedy. The carriers accepted the Commission's recommendations; they were rejected by the Unions. On the crew consist issue, the Commission found that there was "overmanning" of trains in road and yard service and recommended that an agreement be negotiated by the parties which would provide for the adoption of national criteria for determining the proper consist of crews, for negotiation with respect to particular crews on individual carriers, and for local arbitration in the event a carrier and the organizations could not agree upon proposed changes in the consist of train crews. (Commission Report, pp. 57-60). The Commission stated that it believed its "recommendations with respect to this issue should have nationwide application." (Commission Report, p. 64.)

11. National conferences on the parties' Section 6 notices were resumed on April 2, 1962 and continued through May 17, 1962.

12. On May 21, 1962, the BRT and the four other organizations involved in these national negotiations applied for the mediatory services of the National Mediation Board pursuant to Section 5 of the Railway Labor Act (45 U.S.C. § 155). Mediation sessions with representatives of the carriers and of the organizations were conducted under the auspices of the Chairman of the Mediation Board for nearly a month without reaching an agreement. On June 26, 1962, the Board requested and urged the parties to agree to submit the controversy to arbitration under Section 7 of the Railway Labor Act (45 U.S.C. § 157); and while the carriers accepted this proffer of arbitration, the Unions rejected it. On July 16, 1962, the Board advised the parties that it had found no practical method of resolving the controversy and on that day terminated its mediatory services.

13. On July 17, 1962, upon receipt of notice that the Mediation Board had terminated its services, the carriers notified the five organizations that as of August 16, 1962,

the carriers would put into effect rules providing for changes in crew consist requirements * * *. On July 26, 1962, the organizations brought a court action to enjoin this plan, * * * Subsequently, on March 4, 1963, the Supreme Court in *Brotherhood of Locomotive Engineers v. Baltimore & O. RR.*, 372 U.S. 284 (1963), held that the parties' Section 6 notices were proper under the Railway Labor Act, and that the parties were free to resort to self-help—the carriers to make effective their proposals, the unions to strike—subject only to the possible creation of an Emergency Board by the President under Section 10 of the Railway Labor Act (45 U.S.C. § 160).

14. Following this decision by the Supreme Court, the President on April 3, 1963, signed Executive Order No. 11101 creating Emergency Board No. 154 to investigate the work rules dispute and report its findings. The Emergency Board commenced its work on April 11, 1963, held a series of meetings with the parties, and reported to the President on May 13, 1963. The findings and recommendations of this Board were substantially the same in principle as those of the Presidential Railroad Commission. * * * The report and these recommendations were promptly accepted by the carriers. The Unions, on the other hand, announced that they would neither accept nor reject the Board's recommendations but that they were willing to use the recommendations as a basis for further negotiations. * * *

15. National negotiations between representatives of the carriers and of the organizations were resumed on May 20, 1963, and continued in the form of conferences and mediation sessions until July 10, 1963. The parties were assisted by the mediatory efforts of the Secretary of Labor, who prepared a draft memorandum of agreement for the settlement of certain aspects of the controversy, including the crew consist issue. The Secretary's suggestions were accepted by the carriers but rejected by the Unions. Similarly, the carriers accepted but the Unions rejected a proposal by President Kennedy that the parties submit all issues in dispute to Associate Justice Goldberg of the

Supreme Court for mediation and, if necessary, for arbitration. On July 10, 1963, with the parties agreeing to withhold unilateral action in the dispute, the President appointed a six-member subcommittee of his Labor-Management Advisory Committee, headed by the Secretary of Labor, to undertake a further comprehensive review of the facts and issues in the controversy. This committee, in a report to the President on July 19, 1963, found that "developments since the report of the Emergency Board had narrowed considerably the area of disagreement"; that both parties had "agreed in principle to a procedure for handling the problem" based upon the recommendations of the Secretary of Labor; but that the parties had not been able to agree upon the scope of the suggested procedure or upon the acceptability of arbitration as a terminal step in resolution of the dispute.

16. The President on July 22, 1963, * * * urged Congress to enact a law requiring the issues dividing the parties to be submitted to the Interstate Commerce Commission for final and binding disposition. The Congress responded with the enactment of Public Law 88-108, 77 Stat. 132, which was approved by the President on August 23, 1963. This Act directed that certain portions of the controversy, including the crew consist issue, be submitted for "complete and final disposition" by a board of arbitration. * * *

17. The board of arbitration established by Public Law 88-108, designated as Arbitration Board No. 282, consisted of two representatives named by the carriers, of whom I was one, two named by the organizations, and three neutral members. The Board held hearings, considered evidence, and heard arguments between September 11, 1963, and November 25, 1963, when it filed its Award in the United States District Court for the District of Columbia.

18. The Award of Arbitration Board No. 282 provided in Article III for a resolution of the crew consist dispute. It established a procedure whereby either a carrier or Union could serve upon the other written notice of proposed

changes in the rules governing the consist of train and yard crews on the carriers' lines. If the parties were unable to agree upon such proposed changes, either side could submit the issue to a special board of adjustment whose award would be final and binding upon the parties. Part C of Article III of the Award prescribed national guidelines which were to be followed by all special boards of adjustment in making their awards. Under Part D of Article III of the Award, employees in active service as of the effective date of the Award were generally to be retained in such service until they retired, were discharged for cause, or were otherwise removed from employment by natural attrition.

19. The Award of Arbitration Board No. 282 became effective on January 25, 1964. * * *

20. Pursuant to the provisions of Article III of the Award of Arbitration Board No. 282, 96 crew consist awards were rendered by special board of adjustment on the individual railroads, including nine on the C&NW and 95 crew consist agreements were executed on individual railroads, including two on the C&NW, thereby obviating the need for arbitration in those cases. All these awards and agreements resulted from notices by the carriers to reduce the size of particular crews. The special board of adjustment awards authorized the elimination of 4,855 positions as unneeded, which was 87.3% of what the carriers sought.

21. During the period of the Award of Arbitration Board No. 282 President Luna of the BRT commenced new crew consist negotiations on a multi-carrier basis with a number of railroads in the eastern part of the United States. At this time there were laws and administrative regulations, sometimes called "full crew laws," in several eastern states which imposed even greater crew-size burdens upon the railroads than the BRT's demands of "one and two" (one conductor and two brakemen). * * * It was thought by many of these roads, therefore, that relief—even though limited—could only be achieved through the repeal of the full crew laws.

22. For many years the rail unions, including the BRT, had successfully worked to prevent repeal of the full crew laws in these eastern states. * * * Nevertheless, on January 29, 1965, Mr. Luna negotiated for the BRT a multi-carrier agreement with the eastern roads which (1) guaranteed to the union a minimum crew consist of one conductor (or foreman) and two brakemen (or helpers) in virtually all classes of road and yard service; and (2) guaranteed to the railroads that the union would immediately withdraw all opposition to the repeal of existing full crew laws and would not seek the enactment of any such new laws. This agreement, commonly called the "Luna-Saunders Agreement" after Mr. Luna and the Chairman of the then Pennsylvania Railroad, is effective until January 1, 1970, and thereafter until changed by the parties under the Railway Labor Act. * * * Shortly thereafter the New York full crew law relating to train crews was repealed. * * *

23. Prior to January 25, 1966, when Award 282 expired, the BRT began its campaign to roll back the 96 awards and 95 agreements made pursuant to Award 282. During 1965 the BRT served Section 6 notices, identical in substance, on more than 80 carriers (not including, of course, those eastern roads which were parties to the Luna-Saunders Agreement). These notices proposed that effective January 26, 1966, the crew consist rules of the carriers provide that in all classes of service there be a minimum crew consist of one conductor and two brakemen or helpers. Thus, the BRT's notices were virtually identical to its original proposals of 1960. Then in the fall of 1965 the Mediation Board, at the BRT's request, docketed for mediation the disputes over the BRT's notices on a large number of railroads.

24. In order to permit concurrent handling of the BRT proposals and such proposals as the carriers would make with respect to future crew consist rules, the carriers served counter-notices upon the BRT in December of 1965. These counter-notices proposed the elimination of all agreements, rules, regulations, and practices providing for a stipulated

number of trainmen, brakemen, or helpers on each crew and proposed that management have the right to determine the number of men to be used on such crews. These counter-notices, and similar notices served by other carriers during December, 1965, invited the BRT to join in the handling of the proposals of both the BRT and the carriers "on a joint national basis" if agreements could not be reached in local negotiations. However, in each instance the BRT replied that it was unwilling to engage in national handling as to any phase of the dispute.

25. The BRT's refusal to negotiate with respect to this dispute on a concerted national basis violated a longstanding custom and practice in railway labor-management relations of handling identical disputes involving a number of carriers on such a basis. * * *

* * * * *

40. * * * Mr. Luna shortly after the enactment of Public Law 88-108 announced the BRT's new determination to refuse future national handling of work rules disputes in order to keep the BRT "in a position to use our economic strength." * * *

* * * * *

42. In late 1965 and early 1966, at the same time that it was claiming that the crew consist rules should be changed on a carrier-by-carrier basis pursuant to Section 6 of the Railway Labor Act, the BRT launched a second assault on the awards and agreements made pursuant to Award 282. In this connection the Brotherhood notified the carriers that in its view the crew consist rules which were in effect prior to Award 282 would automatically revive upon the expiration of the Award in January of 1966. The BRT demanded that crew assignments that had been abolished pursuant to the Award be immediately restored. The carriers took the position that it was clear from the purpose and history of P.L. 88-108 that Award 282 was not to be a mere interim measure and that rules established pursuant to that Award were to continue in

force until changed in accordance with the procedures of the Railway Labor Act.

43. In order to seek a resolution of this disagreement, on January 19, 1966, nearly 150 carriers, including the C&NW, filed suit in the United States District Court for the District of Columbia against the BRT and others for declaratory and injunctive relief. In this suit the railroads contended that the crew consist rules then in effect could not be changed except in accordance with the procedures of Section 6 of the Railway Labor Act. On March 3, 1966, the District Court, by Judge Alexander Holtzoff, sustained the carriers' position in *Akron & Barberton Belt RR. v. Brotherhood of RR. Trainmen*, 250 F. Supp. 691. The Court ruled that Award 282 and the agreements and awards made pursuant thereto created new work rules which remained in effect after January 25, 1966, and that these new rules could be changed only by the procedures provided in Section 6 of the Railway Labor Act. This ruling was later affirmed by the United States Court of Appeals for the District of Columbia Circuit, 385 F.2d 581 (1967), and *certiorari* was denied by the Supreme Court, 390 U.S. 923 (1968).

44. As I have said, after 1963 the BRT absolutely refused to participate in the national negotiation of the crew consist dispute. In an effort to bring about national handling of the crew consist issue, the National Railway Labor Conference invoked the jurisdiction of the Mediation Board with respect to all counter-notices served by the carriers during December, 1965. This invocation was made on April 4, 1966, and the next day the Mediation Board in effect denied the carriers' request and directed them to proceed to the local properties for the mediation of the individual disputes.

45. Judgment was entered in the *Akron* litigation by the District Court on April 6, 1966. At that time the Court ruled that the parties' "[n]otices of proposed changes in crew-consist rules served pursuant to Section 6 of the Rail-

way Labor Act, between January 25, 1964, and January 25, 1966, . . . did not become effective under the Railway Labor Act until January 26, 1966." Nevertheless, the Mediation Board treated the BRT's prior invocation of mediation as having been proper, and in April, 1966, the Board proffered arbitration to four carriers, the Atlantic Coast Line Railroad Company, the Boston & Main Corporation, the Missouri Pacific Railroad Company, and the Louisville & Nashville Railroad Company.

46. On April 12, 1966, these four carriers filed a Motion For Supplemental Relief in the *Akron* litigation. In that motion the carriers requested an order declaring that the crew consist rules could not be changed until the initial conferences between the parties prescribed by Sections 5 and 6 of the Act were held *after* the expiration of Award 282 and until the other procedures of the Act were also exhausted *subsequent* to such conferences. On May 31, 1966, the District Court granted the carriers' motion. The Court ruled that the notices of the parties were not effective until January 26, 1966; that until this time the parties were under no obligation to confer; and that meetings held before January 26th did not constitute "conferences" within the meaning of Sections 5 and 6 of the Act. Therefore, the Court concluded that neither side could resort to self-help; that conferences should be commenced within a reasonable time after the entry of the order; and that recourse to the Mediation Board could not be had until conferences fulfilling the requirements of Sections 5 and 6 of the Act were held. Two days later, June 2nd, the Mediation Board "urged the parties" to hold such conferences promptly and advised that it was continuing the cases which had been docketed before it.

47. As the dispute was considered in conference on the different railroads following the *Akron & Barberton Belt* litigation, the carriers again urged the BRT to agree to national handling of the dispute, and again the same negative answers were given by the BRT on each railroad.

There was no question, of course, that the actual handling of the dispute on the BRT's side was national and that Mr. Luna was directing the progress of the dispute himself on a uniform basis on all carriers. Thus, on June 18, 1965, Mr. Luna wrote all his general chairmen on individual roads setting forth the BRT's position as to the effect of the expiration of Award 282, directing the service of the new uniform Section 6 notices, and attaching the text of the notices' demand for a uniform one-and-two crew consist rule. These, then, were the notices which were served identically on each of the more than eighty carriers commencing in June of 1965. When the carriers responded, on July 9, 1965, Mr. Luna wrote his general chairmen again and enclosed a uniform draft reply to be sent to all roads. Another uniform reply to all the carriers was drafted and sent to the general chairmen by Mr. Luna on October 5, 1965. When the carriers served their counter-notices in December of 1965, Mr. Luna again dictated a uniform response for the general chairmen in a letter to them on December 28, 1965. Again, on January 6, January 14, March 18, March 31, and June 9, 1966, Mr. Luna wrote to the general chairmen on the individual railroads with the text of identical letters to be sent out to all the carriers in succeeding phases of the dispute. Thus, although Mr. Luna professed to have come to the new determination that local conditions required crew consist rules to be negotiated on a carrier-by-carrier basis, the dispute continued to be handled in fact on a uniform, national basis.

48. On August 29 and 30, 1966, I met in Chicago with Mr. Luna and with Mr. Leverett Edwards, Chairman of the National Mediation Board, at Mr. Edwards' suite in the Blackstone Hotel, for the purpose of discussing possible ways of resolving the dispute over the BRT and carrier crew consist notices mentioned above. In particular, we sought to determine whether there was any common ground between the stated position of the BRT that these notices were not an appropriate subject for national handling and

the position of the carriers that they were. During these meetings, Mr. Edwards suggested, and Mr. Luna and I orally agreed, without waiver of the position of either side with respect to national *versus* local handling of the dispute, that a series of "test" negotiations would be conducted between representatives of six selected carriers and the NRLC on the one hand, and those of the BRT on the other, in order to see whether any principles or guidelines might emerge which could serve as a pattern for agreements on other railroads or for a national agreement to settle the entire crew consist dispute. It was agreed that these negotiations would be held at the headquarters of each railroad selected, would be conducted by a mediator to be assigned to each railroad by the National Mediation Board, and would be attended by representatives of each railroad, the NRLC, and the BRT. It was agreed that Mr. Luna, Mr. Edwards, and I would meet again at the conclusion of these "test" negotiations to discuss whether anything had been accomplished which would point the way to a settlement of the entire crew consist dispute, and that, until this procedure was completed, the National Mediation Board would not terminate its services on the three railroads as to which proffers of arbitration had been made by the Board. It was agreed that these "test" negotiations would begin on September 13 on the following railroads: The Boston & Maine Corp., Atlantic Coast Line RR., Southern Ry. System, Chesapeake & Ohio Ry., Missouri Pacific Lines, and Union Pacific RR.

* * * * *

58. Although the BRT pursued a variety of tactics in the different negotiations, certain common patterns emerged from all the discussions. The BRT uniformly refused to recede from the sweeping proposal of a minimum crew consist of one conductor and two brakemen, although the carriers were willing to discuss areas of compromise. In general, the BRT refused even to discuss the issues with respect to mainline through freight assignments, although the agreement between Messrs. Luna and Edwards and me expressly

contemplated that all the issues raised by the parties' Section 6 notices would be discussed, and the notices on both sides included proposals affecting mainline through freight assignments. The BRT showed, by its refusal to consider the impact of the parties' proposals upon particular crews on each road, that the BRT was seeking a uniform national crew consist rule, despite assertions on other occasions that the issue of crew consist is essentially local. At no time was the BRT willing to discuss the possible terms of national guidelines to be applied in the settlement of the crew consist dispute, although Messrs. Luna and Edwards and I had clearly agreed that that would be the principal purpose of these test negotiations. The BRT rebuffed all efforts by the carriers to conduct the negotiations in terms of considering what revision, if any, might justifiably be made in the procedures and guidelines established by Award 282, or in the crew consists specified in agreements or special board awards made pursuant to Award 282. That the goal of the BRT was to abolish everything that was accomplished under Award 282 was shown by the consistent refusal to agree that the crew consist agreements and special board awards might be maintained, by the failure to advance any evidence to show that conditions since the making of these agreements and awards have changed in such manner as to justify revision of the consist of crews affected by the Award, and by such extreme recalcitrance as unwillingness to consider even a date which corresponded to the effective date of Award 282.

59. After the negotiations on the six carriers were recessed, there remained the last step of the procedure agreed upon by Mr. Luna, Mr. Edwards, and me in our Chicago meetings of August 29-30—the post-negotiation meeting between the three of us to discuss the results of the negotiations and the possible development of guidelines. * * * Mr. Edwards then told me that he had no choice but to terminate the services of the NMB on the three railroads, Atlantic Coast Line, Boston & Maine, and

Des Moines Union; and on October 4 the NMB did notify these carriers that its services were terminated.

* * * * *

61. After the NMB had terminated its services in the crew consist disputes involving the Atlantic Coast Line, Boston and Maine, and Des Moines Union, these three carriers on November 1, 1966, filed suit in the District of Columbia for declaratory and injunctive relief against the BRT. *Atlantic Coast Line RR., Et Al. v. Brotherhood of RR. Trainmen,* Civil Action No. 2908-66 (D. D.C.). These plaintiffs alleged in part that the BRT had failed to bargain in good faith and in accordance with the Railway Labor Act by refusing to permit national handling of the crew consist dispute. * * *

62. The BRT took the position in the *Atlantic Coast Line* case that local handling of the crew consist issue was essential because of the need for local rules to meet conditions prevailing upon each individual railroad, and also because conditions varied greatly from carrier to carrier and even from location to location on a single railroad. * * *

63. The District Court rendered its opinion in *Atlantic Coast Line* case on January 16, 1967. *Atlantic Coast Line RR. v. Brotherhood of RR. Trainmen,* 262 F. Supp. 177. It held that the Railway Labor Act required the Brotherhood to participate in national handling of the 1966 phase of the crew consist dispute and that, because the Brotherhood had refused to do so, it had not exhausted the procedures of the Act and could not engage in the threatened strikes. 262 F. Supp. at 189. * * *

64. The BRT appealed this decision to the District of Columbia Circuit, and that Court on September 6, 1967, reversed the trial court. 383 F.2d 225. * * * The controversy over national handling ended finally on January 15, 1968, when the Supreme Court denied *certiorari.* 389 U.S. 1047.

65. Shortly thereafter, in early February, 1968, the BRT struck the Atlantic Coast Line, the Missouri Pacific,

and the Texas and Pacific railroads, whose crew consist dispute with the BRT had been released from mediation. Consequently, on February 9, 1968, these three roads and the Southern Railroad, whose dispute with the BRT had also been released by the Mediation Board, signed an agreement with the BRT in Jacksonville, Florida, to settle the crew consist dispute on those carriers. The "Jacksonville Agreement," as it has been called, called for immediate restoration of 50% of the crews which these carriers had reduced pursuant to the Award of Arbitration Board No. 282, and for further immediate negotiation over the remaining 50%. If within 34 days the parties failed to agree on a disposition of the remaining 50%, the parties were again relegated to self-help—that is, the BRT could strike, and the carriers could implement their proposed rules. The ultimate result was the restoration of all but a handful of crews on these carriers to a one-and-two basis.

66. In the wake of the Jacksonville settlement, agreements were signed on a number of other carriers. As I had by that time retired as Chairman of the National Railway Labor Conference, I cannot speak with personal knowledge respecting the negotiations that led to these agreements, except to the extent indicated in the following paragraphs of this Affidavit. My understanding, however, is that the agreements on these other carriers were substantially identical to the Jacksonville agreements—that is, the pattern was the casting aside of the scores of arbitration awards and agreements made pursuant to P.L. 88-108 and the restoration of all but a token number of crews to a one-and-one basis. If that is so, as I believe it to be, then, based upon my lengthy experience in these matters, my firm opinion is that these carriers entered into such agreements not out of conviction that they represented a just resolution of the controversies, but out of a fear of exercise by the BRT of the "whipsaw" strike tactics it had employed against the carriers that entered into the Jacksonville agreement.

67. Some railroads resisted to the point of strike. During 1968 the National Board released the crew consist disputes with the BRT on three carriers—the Chicago Belt, the Illinois Central, and the Louisville & Nashville. The BRT thereupon again put into play its "whipsaw" tactics. In July the BRT struck the Chicago Belt, and in November it struck the Louisville & Nashville, both strikes ending only with the appointment of Emergency Board No. 172 by President Johnson on November 6th. When Emergency Board No. 172 held hearings in Washington, I testified on behalf of the three carrier parties, and I later assisted the carriers in mediation sessions with the BRT conducted by the members of the Emergency Board after the hearings were closed.

68. The Report of Emergency Board No. 172 urged the parties to resume bargaining over their respective crew consist proposals. As prior public agencies had done—the Presidential Railroad Commission, Emergency Board No. 154, Arbitration Board No. 282—this Board recommended the adoption of overall guidelines to govern proper crew size determinations and then the application of those guidelines on a local basis to particular crew assignments. * * *

69. On December 23, 1968, shortly after Emergency Board No. 172 had issued its Report, BRT President Luna and I met at my request at the Union League Club in Chicago. We discussed our previous exploratory talks in Washington after the close of hearings by Emergency Board No. 172, but we could not make any progress. Later in our discussion Mr. Luna stated unequivocally that a settlement of the crew consist dispute on these carriers could not be effected unless the railroads accepted the conditions of the so-called Jacksonville settlement. I told him in response that I did not think that that position met the test of good faith bargaining, especially in the light of his statements made on many occasions that any settlement arrived at locally which his local people could live with would be acceptable to him. I then asked Mr. Luna if I

was free to tell the three carriers that his position was that any settlement which did not conform in almost exact detail to the Jacksonville settlement would be unsatisfactory to him and that he would not permit his local representatives to settle on that basis. Mr. Luna said that I was at liberty to tell the three roads that that was his position.

70. Thereafter, on January 13, 1969, the BRT struck the Louisville & Nashville again without notice. Although the strike was temporarily restrained by the United States District Court for the Middle District of Tennessee, on February 10, 1969, the railroad signed an interim agreement similar to the first phase of the Jacksonville pattern agreement which I have mentioned above, and on May 26, 1969, a final crew consist agreement which was also similar to the Jacksonville agreement. On or about April 3, 1969, a final agreement was made on the Chicago Belt which conformed to the Jacksonville Agreement. Then on April 8, 1969, the BRT also struck the Illinois Central without notice; and on April 13 this carrier too signed an interim agreement similar to the first phase of the Jacksonville pattern.

[Subscription and notarial certificate omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

AFFIDAVIT OF JAMES R. WOLFE ON BEHALF OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY

James R. Wolfe, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the Vice President - Labor Relations of the Chicago and North Western Railway Company * * *

2. The affidavit of my father, Mr. James E. Wolfe, formerly the Chairman of the NRLC, on behalf of the C&NW recites the general history of the crew consist dispute since

its inception in the 1950's. (Prior to that date, trains in this country were generally manned by an "engine crew" consisting of an engineer and a fireman, and a "train crew" consisting of a conductor and two brakemen.) My affidavit intends to set out the facts relating to the crew consist dispute, *i.e.*, the dispute relating to the size of "train crews", with the former Brotherhood of Railroad Trainmen (hereinafter referred to as the "BRT"), and its successor, the United Transportation Union (hereinafter referred to as the "UTU"), as the dispute has developed on the C&NW since the rendition of the Award of Arbitration Board No. 282 in the fall of 1963. Prior to that time the C&NW had always been a part of the national dispute with the BRT and other unions over crew consist, had served the November, 1959, carrier notices under Section 6 of the Railway Labor Act proposing to commit the issue of train crew size to managerial discretion, had been served with the BRT's and other unions' Section 6 notices of September, 1960, proposing a uniform national rule requiring a minimum train crew of one conductor and two brakemen on all trains, had participated in the proceedings before the Presidential Railroad Commission and Emergency Board No. 154, and was a party before Arbitration Board No. 282.

* * *

3. As is explained in Paragraph 18 of the Affidavit of James E. Wolfe, Section III of the Award of Arbitration Board No. 282 relating to crew consist prescribed a national procedure for both carriers and unions to follow for changing the size of existing train crews on individual railroads and moreover laid down national guidelines to be followed locally in determining the appropriate size of particular crews on individual railroads. Pursuant to the Award, a party desiring a change in the number of men on a given crew or on a number of crews could serve written notice on the other party designating the crews sought to be changed. The Award then required the parties to negotiate on the matter promptly. If they agreed to increase or decrease the number of men in the train crew, that ended the controversy. (Award § III(A)). If agreement failed,

the party proposing the change could submit the issue to binding arbitration by a special board of adjustment created on that railroad. (Award § III (B)).

4. After the rendition of the Award of Arbitration Board No. 282 in November, 1963, and before it became effective in January, 1964, the C&NW reviewed and studied the work of its train crews in both road and yard service to determine whether the Award's guidelines authorized changes in crew size. The C&NW conducted studies in each of the individual districts into which the carrier is divided for purposes of labor relations matters. Thereafter the carrier served notices under Section III(A) of the Award of Arbitration Board No. 282 upon those organizations which represented brakemen and helpers in road and yard service on the C&NW, *i.e.*, the BRT in most instances and the Switchmen's Union of North America ("SUNA") in one. (Both the BRT and the SUNA have since merged with two other labor organizations into the UTU, but there has been no significant change in the personnel of these organizations involved in this dispute.) By these notices the carrier generally asked that train crew reductions be made in all yard crews from a minimum consist of one conductor (generally denominated "foreman" when in yard service) and two brakemen ("helpers" in yard service) (*i.e.*, "1 and 2") to a consist of one conductor and one brakeman (*i.e.*, "1 and 1"). In branch line road service where Award 282 also established procedures for crew changes, the carrier's notices generally proposed reductions from a crew of "1 and 3" to a crew of "1 and 1", or from a crew of "1 and 2" to a crew of "1 and 1." The negotiations which followed between the C&NW and the BRT and SUNA with some exceptions failed to result in agreements to dispose of the crew consist dispute.

5. Consequently, following the breakdown of negotiations over the C&NW crew consist notices in the carrier's several districts, a number of special boards of adjustment were created to arbitrate the dispute pursuant to the pro-

cedures established by Section III(B) of Award 282. These special boards, composed of one carrier member, one union member, and a neutral, held hearings for the taking of oral and written evidence, considered written briefs, and neard oral argument. Much attention was paid by both the parties and the neutral to the issues of safety and work burden—whether the carrier's proposed crew reductions would result in unsafe working conditions for the men or place an undue work burden upon them. In nearly all cases, the special boards resolved these issues of safety and work burden, along with the other guidelines specified by the Award of Board No. 282, in favor of permitting the reductions sought by the carrier. * * *

6. In three instances the carrier's crew reduction proposals were settled by agreement with the BRT * * *. In addition, the Chicago Great Western Railway Company, which has since been merged into the C&NW, made a crew consist agreement pursuant to the procedures of Award No. 282 with the BRT on August 6, 1964. * * *.

7. The Affidavit of James E. Wolfe has described in general the efforts of the BRT to undo the accomplishments of both the Award of Arbitration Board No. 282 and the special board of adjustment awards and crew consist agreements which followed. The C&NW was not excepted. On July 3, 6, and 7, 1965, the BRT served upon the C&NW and upon the former Chicago Great Western the union's new Section 6 notices which proposed a uniform rule requiring a crew consist of "1 and 2" on virtually all road and yard crews on the carriers' systems. On some road crew assignments the BRT asked for a consist of "1 and 3." Copies of the notices served by the BRT upon the "C&NW Proper" District on July 6, 1965, are attached hereto as Exhibits A (notice relating to road service) and B (notice relating to yard service). These demands, of course, if agreed to by the carrier, would nullify completely the manning reductions—roughly 200 jobs—which the abovementioned awards and agreements accomplished.

8. When the nation's rail carriers took the position that the BRT's notices were barred by the Award of Arbitration Board No. 282, the union invoked the services of the National Mediation Board. The Board docketed the disputes over the notices served by the BRT on the then four districts of the C&NW on October 4, 1965, as NMB Case Nos. A-7523 ("C&NW Proper" District), A-7524 ("M&StL" District), A-7525 ("CStPM&O" District), and A-7526 ("L&M" District). Subsequently the dispute over the notice served by the BRT on the former Chicago Great Western was docketed by the NMB as Case No. A-7645. Nevertheless, no conferences or mediation sessions were held on any of these BRT notices in 1965.

9. On or about December 24, 1965, most of the railroad industry, including the C&NW as to its several districts, served the national Section 6 notices upon the BRT. With these notices the C&NW proposed the elimination of all existing crew consist rules and the adoption of a new rule which would commit the matter of crew size to managerial discretion, *i.e.*, the same proposals which the railroad industry served in 1959, and which were finally disposed of by the Award of Board No. 282. A copy of the C&NW's notice served on the "C&NW Proper" District is attached hereto as Exhibit C.

10. The carrier's Section 6 notice of December 24, 1965, also proposed that if the parties could not settle the crew consist dispute in initial conferences on the property they would commit the dispute on the C&NW, along with those pending on the other railroads, to national handling in accordance with established practices in the railroad industry. However, the BRT responded on December 12, 1965, by agreeing to meet in conference on the carrier's notices, but refusing to engage in national handling. * * *

11. When the parties met in conference on January 18, 1966, they did not discuss the merits of the crew consist dispute. Instead the BRT insisted that the purpose of the meeting was only to discuss the carrier's notices and that

the union would refuse to handle the whole crew consist dispute on this railroad together. * * * The BRT also again refused to enter into national handling of any phase of the crew consist dispute * * *.

12. The carrier's next conference on the crew consist issue was held only with the General Chairman of the carrier's "Milwaukee Industrial" District on March 28, 1966, again without discussion of the merits. BRT General Chairman Richardson mentioned the Luna-Saunders Agreement as "setting a precedent" for disposition of the entire dispute, thereby suggesting that the dispute which the BRT had previously said could be handled only on a local basis should nevertheless be resolved by adopting a uniform national rule of "1 and 2."

13. The carrier met with the representatives of the BRT again on June 28, 1966, at which time BRT General Chairman Spiegel ("C&NW Proper" District) reiterated the union's position that the

> ". . . carrier's notice and the organization's notice are two separate issues and will be handled separately."

When the carrier representative stated that he understood the purpose of the conference to be discussion of the notices and proposals of both parties, Mr. Spiegel again refused to discuss the carrier's demands concurrently with the BRT's. Then Mr. Spiegel announced that he was free to make an agreement himself on this railroad, indicating that he was not bound by any national determination of a settlement, and in this regard he stated that he was not just "going through the motions." However, in nearly the next breath Mr. Spiegel urged upon the carrier the adoption of the Luna-Saunders Agreement and its uniform "1 and 2" rule. The parties then recessed with an informal agreement to make separate studies of crew consist needs on individual jobs.

14. In March of 1968, the C&NW decided to try a new approach in an effort to arrive at a compromise. Basically, that approach involved offering to share with the employees

the savings accomplished by the elimination of wasteful labor costs. Accordingly, the C&NW proposed that the parties enter into an agreement under which the basic daily rate of brakemen working on "1 and 1" crews would be increased by $3.45. This would have meant, on the average, an annual wage increase of around $1,000 for each brakeman working on such crews. The union, however, promptly and unequivocally refused to bargain over that proposal and vigorously protested against any further discussion along those lines. On March 14, 1968, union General Chairman Maloney wrote to the C&NW and stated:

> "We are not willing to enter into negotiations on such a proposal, and you are hereby advised that same is not acceptable."

The C&NW therefore, in order not to introduce further tension into the negotiations, refrained from pressing its proposal. Later, I learned that in strike injunction litigation brought by another railroad, the UTU's President, Mr. Charles Luna, testified that the union's negotiators were bound by a UTU convention action not to discuss any carrier proposal to compromise the dispute on any basis that would include the payment of additional wages to employees. Thus, he said on cross-examination:

> "Q. Mr. Luna, you testified your general chairmen are perfectly free to make whatever agreement they wish on the L&N, is that right?
>
> "A. With the exception of taking money. We have convention action, which is the governing body of this organization. That is against selling a man's job for x number of dollars" (Transcript of preliminary injunction hearing, p. 350, *Louisville & Nashville RR. v. United Transportation Union*, Civil Action No. 5784 (M.D. Tenn. 1969)).

Moreover, Mr. Luna, in statements printed in the union's newspaper, the *Trainmen News*, proclaimed his unalterable opposition to negotiations involving consideration of a compromise based upon increased compensation—compensation that he called "Judas Money." (Trainmen News, vol. 22,

No. 13, p. 1 (March 23, 1968); op. cit., vol. 22, No. 14, p. 1 (March 30, 1968)).

15. The parties did not meet again on crew consist until March of 1968 when BRT President Charles Luna and C&NW Chairman Ben W. Heineman and President Larry S. Provo discussed the crew consist dispute briefly. At that time Mr. Luna argued that "1 and 2" crews were more economical than smaller crews and that the carrier was actually losing money by refusing the union's demands for larger crews. Messrs. Heineman and Provo offered to study the economics of crew size on this railroad and furnish the results to the BRT. When completed this study showed clearly the carrier's savings by operating with small crews. On May 16, 1968, pursuant to an agreement between the BRT's C&NW General Chairman Maloney and me that we would make a real effort to sit down and settle the crew consist dispute, other carrier representatives and I met with General Chairman Maloney on the "C&NW Proper" District, the largest of the carrier's districts. The results of the carrier's economic studies were first handed to Mr. Maloney, together with an offer to discuss them and answer questions about them. Mr. Maloney did not then look at the studies, and no representative of the BRT ever mentioned them again except upon one later occasion when Mr. Maloney simply remarked that he did not understand them. In answer to that remark we offered to explain the study, but Mr. Maloney never indicated a willingness that we do so. During most of the conference of May 16 we identified all the existing jobs which were being operated on the "C&NW Proper" District with "1 and 1" crews and then agreed that at subsequent meetings we would study yard jobs first, then road jobs. Nevertheless, before recessing Mr. Maloney remarked that all Chicago Terminal jobs would have to be operated with "1 and 2" crews.

16. At the next three conferences the parties considered yard jobs. On June 12, 1968, Mr. Maloney discussed a number of yard assignments on the "C&NW Proper" District and commented on some jobs which in his opinion

would have to be restored and others which could remain at "1 and 1." He conceded that 4 or 5 jobs could continue to be worked with one helper. Finally, he insisted again that all Chicago Terminal crews must be worked with "1 and 2," and that "there was not even any sense in discussing them". More discussion of yard assignments followed at the conference of June 20, 1968, at the conclusion of which Mr. Maloney stated that of some 80 yard jobs then being operated in the "C&NW Proper" District with "1 and 1" crews only 6 could continue with "1 and 1," and of these two were not then in existence but had been abolished earlier. At the third meeting on July 17, 1968, the carrier representatives reviewed our notes on about one-half the yard assignments on the "C&NW Proper" District and discussed reasons why these assignments could be operated safely and efficiently with small crews. The remainder were to be discussed at our next meeting.

17. At the conference on August 6, 1968, Mr. Maloney was joined by BRT Vice President Francis Tuffley. After we had finished discussing "C&NW Proper" District yard assignments on behalf of the carrier, I said that many road assignments on branch lines in that district ought to remain "1 and 1" and that also many mainline jobs should be reduced to "1 and 1." Mr. Tuffley, however, did not answer me but, rather, put on the table a number of crew consist agreements which the BRT had entered into with other railroads. In the conversation that followed Mr. Maloney indicated that what was "good enough for those railroads" should be good enough for the C&NW. Mr. Tuffley then asked me how my railroad could justify a different agreement. When I said that I could not follow these other agreements since the C&NW had proved the effectiveness of "1 and 1" crews by using them continuously for four years, the BRT representatives began to pack up their papers preparatory to leaving the room. Mr. Tuffley said it was clear that we were "getting nowhere," that the Mediation Board ought to be brought in, and that the C&NW quite clearly did not intend to make a settlement

like those all the other railroads had made. I again protested that we had not discussed any of the road jobs in the "C&NW Proper" District which were now operating with "1 and 1" crews, nor had we discussed any of the "1 and 2" crews which the carrier wished to reduce pursuant to our Section 6 notice. The meeting ended there.

18. On the following day, August 7, 1968, Mr. Maloney called me to agree that we ought to discuss road jobs in his district and that he would later call for another conference in three or four weeks. Mr. Maloney's agreement that the road jobs should be discussed and to postpone requesting the services of the Mediation Board coincided with the BRT strike of the Chicago Belt over crew consist. Mr. Maloney did not call for another conference date, and I did not discuss crew consist with the BRT again until brief conversations with Mr. Maloney took place in October and in January when we agreed only to defer our discussions. Then on April 14, 1969, a day after the Illinois Central Railroad Company had entered into a crew consist agreement with the union to settle a strike on that carrier, Mr. Maloney called to tell me that BRT (now UTU) President Luna "was after [him] to get moving on crew consist." I agreed to another conference for April 22, 1969.

19. Much of the conference on April 22, 1969, was devoted to a UTU demand concerning changes in rules in the carrier's suburban service, the union chiefly wanting the carrier to agree to a five-day work week. However, the subject of crew consist was also discussed. The quotations set out below are taken from my conference notes; and if they are not exactly verbatim, they are at a minimum substantially accurate.

20. Mr. Maloney for the UTU first stated that his "hands were not tied" on the crew consist issue and that he wanted to try to settle both that dispute and the one over suburban service together. Later, however, he added that any settlement along those lines would require the approval of UTU national Vice President Tuffley, since the Grand Lodge

was "calling the shots" on crew consist. Then when asked whether he thought all "1 and 1" jobs should be restored, the following discussion took place:

> "[Maloney] No, I believe that the crew consist agreements which have come through on other railroads have shown between 70% and 80% of the jobs returned to service and I would think around 72% of the jobs should be restored.
>
> "[Wolfe] I assume from what you say, that you are not agreeable to any deviation from those national percentages in disposing of our crew consist notices.
>
> "[Maloney] That's right. I am going to have to get the national average of jobs returned to service."

Mr. Maloney then proposed that a certain number of these "1 and 1" jobs might not be restored in return for carrier concessions in the suburban service dispute:

> "[Wolfe] Do you then mean that we could restore that percentage of jobs and then again remove some of those jobs because of the suburban service Five Day Work Week?
>
> "[Maloney] No, I must dispose of the entire crew consist issue once only. The original disposition must take into account that certain jobs are not restored and that a suburban service Five Day Work Week Agreement will be placed in effect instead. A somewhat similar agreement was made on the L&N where the crew consist issue was used to resolve other local bargaining problems on the property."

Later, there was this exchange:

> "[Maloney] We want [enumerates demands in suburban service]. [In return] we will yield on the number of crew consist jobs returned in the Chicago area sufficient to cover all this cost.
>
> "[Wolfe] What about the matter of crew consist in road service? We haven't talked about that yet.
>
> "[Maloney] The general trend of the agreements around the country has been that road service will be manned one and two.

"[Wolfe] You mean you don't want to talk about road service?

"[Maloney] No, except in the Chicago area.

". . . .

"[Wolfe] How are we going to settle the road service subject?

"[Maloney] We will have to have one and two on these jobs. My proposal is that all jobs on the road be manned one and two, except in the Chicago area.

"[Wolfe] What about our proposal on main line way freights?

"[Maloney] This has been set aside in other handling.

"[Wolfe] Then you are not willing to talk about crew consist on the road, except in the Chicago area?

"[Maloney] That is right, except in Chicago."

21. At the parties next conference on April 30, 1969, Mr. Maloney started off by saying:

"[Maloney] I will be very candid. I was low man on the totem pole on crew consist on the main line railroads. IC [Illinois Central] and C&NW were the last, and it was decided they should not both be tackled at once. IC was first. Now that the IC has settled I am being questioned by Grand Lodge Officers on where I stand. I can only get by so long, and it will soon be necessary to get a mediator. Grand Lodge officers tell me I am first-out to settle this or get a mediator. I don't believe we will encounter any difficulty with other General Chairmen [having them come in to the discussions] because we are not going to deviate from the national average."

After discussion on a range of subjects involving the "C&NW Proper" District—but not individual jobs—Mr. Maloney said:

". . . I don't believe it will be too difficult to reach agreement. This file should be enough.

"[Wolfe] What is in that file?

"[Maloney] It contains all of the crew consist agreements in the country. The percentages established will have to be followed here. You didn't think I would agree on lower percentages here, did you?

". . . .

"[Maloney] The pressure on me to make a crew consist agreement is very strong."

The meeting ended after a discussion of other unrelated matters.

22. The next conference, on May 9, 1969, was attended by UTU (formerly BRT) general chairmen for the "C&NW Proper," "L&M," "M&StL," and "CStPM&O" Districts. This conference therefore represented the first time since the prefatory meetings of January 18, 1966, and June 28, 1966, that union representatives from the "CStPM&O," "M&StL," and "L&M" Districts had conferred with the carrier on crew consist. Mr. Maloney stated that the C&NW was the last railroad to settle with the UTU because the union recognized that it could not strike both the Illinois Central and the C&NW at the same time. Now he said, "Charlie" Luna was chaffing at the bit. Maloney next stated it was not necessary for him to discuss manning needs on individual jobs: he had discussed "C&NW Proper" yard jobs informally with the C&NW, and there were plenty of precedents now. General Chairman Cardinal representing the "CStPM&O" District then said that he could see no sense "sparring" around, that it would be "ridiculous" for him to agree to anything different from the crew consist agreements on the Milwaukee Road and the Great Northern railroads where the men work side-by-side with C&NW employees in certain terminals. Mr. Maloney stated that if he entered into an agreement restoring only 40% of the present "1 and 1" jobs he "would be in trouble in Cleveland." He also said that if the carrier and the union considered and discussed all the individual jobs involved in this dispute they "would be [there] until next

istmas." Mr. Maloney then withdrew the offer to mpt to settle crew consist in connection with a settle- t on suburban service. I later stated that while Mr. oney and I had discussed all the yard jobs, we hadn't ussed the road jobs. Mr. Maloney replied first that all road jobs would have to be restored to "1 and 2," ept pile drivers (a very small number of jobs) and sec- , that consideration of the "1 and 1" road jobs would a long time and that he wouldn't agree to a job-by- study on them. Later he stated that he did not want e pinned down on what he will insist on in road serv- I finally attempted to describe Mr. Maloney's position ollows:

> "You do not want to go over the road assignments on a job-by-job basis, and you expect that all of them must be restored because of the IC and L&N agreements."

Maloney responded by saying that he expected all road to be restored, not because of the IC or L&N, but use of productivity. Then he added, however, "All of others have gotten together and why can't we?" There no discussion or even a listing during this conference ndividual jobs on the "L&M," "M&StL," or "CStPM&O" ricts, although I advised the union representatives that should not terminate on-the-property negotiations until ussions for the whole C&NW system were complete.

3. The conference of the morning of May 15, 1969, held with General Chairman Cardinal of the "CStPM&O" rict only. The parties simply identified the jobs now king "1 and 1" without any discussion of their man- requirements. Then Mr. Cardinal stated positively that he jobs so identified had to be restored to "1 and 2," nting out to me that the Milwaukee Road and the Great thern had restored all their crews. I asked if Mr. Cardi- meant that all the "1 and 1" jobs on his district had to estored to "1 and 2," not because the men were needed, because other railroads put them back. Mr. Cardinal replied that he wasn't saying just that, but a second

later he answered that maybe he was saying just that. When I then asked if Mr. Cardinal thought it would be a "waste of time" to discuss all the jobs, he answered that, to be honest, he thought it was. Nevertheless, I proceeded to to review some yard jobs in the "CStPM&O" District, but at the end of that review Mr. Cardinal announced that he wanted all jobs restored to "1 and 2" and that he must have them restored because, in his words, "the other railroads have put the men back." When asked again if he wanted to discuss a particular set of jobs he refused, replying that he wanted them all restored. Later when I argued that the operational needs of the railroad did not justify "1 and 2" crews, Mr. Cardinal answered that the jobs had to be restored no matter and added: "Why kid ourselves?" I finally referred to some road jobs in the "CStPM&O" District, and Mr. Cardinal refused to discuss the manning requirements on any. At one point he said the union required all the jobs restored in the Twin Cities area in view of the Milwaukee Road and Great Northern settlements.

24. The conference of the afternoon of May 15, 1969, was attended only by UTU General Chairman Stahley of the "Chicago Great Western" District which represented the first time that a union representative had met with the C&NW to confer on the crew consist dispute on that district. After much general background discussion, we merely identified without any discussion all the "1 and 1" jobs in the "CGW" District (which were all the jobs in that district with certain exceptions at Oelwein Yard and some main line assignments). Although Mr. Stahley at first indicated a willingness to discuss individual jobs, he then excluded those at the Kansas City Missouri terminal where, in his words, "the agreements of the Milwaukee Road, Kansas City Southern Railway, and others had to be followed." When I protested, Mr. Stahley replied that those agreements were the only guidelines he could think of. Moreover, he further stated that UTU Vice President Tuffley had instructed him that the C&NW had to conform to the same disposition reached on other railroads. Thereupon Mr.

Stahley conceded that "as a practical matter" he could "not agree to anything else" and declined to enter a job-by-job discussion until he learned whether or not the dispute on his district (the "CGW" District) would be included in mediation sessions which the Mediation Board had announced were forthcoming.

25. The conference of May 15, 1969, marked the end of the on-the-property conferences. During those negotiations, the union at least listened to the carrier's position (although their representatives always emphasized that eventually any agreement had to conform to the national pattern) relating to individual yard jobs in the "C&NW Proper" District, but for yard crews in the four other districts and for road jobs in all C&NW Districts, the union refused to even hear a presentation of the carrier's position. In fact, although the union representative of the "C&NW Proper" District met with the carrier a total of nine times (January 18 and June 28, 1966; June 12, June 20, July 17 and August 8, 1968; and April 22, April 30 and May 9, 1969) during which meetings the parties discussed yard jobs in that district but not road jobs, meetings with representatives of the other districts on the C&NW system were only perfunctory: (1) the General Chairmen of the "M&StL" and "L&M" Districts appeared at the prefatory meetings of January 18 and June 28, 1966, when procedures were discussed and at the general meeting of May 9, 1969, but at no time did they discuss the manning requirements of the individual jobs on their districts or, for that matter, even listen to a presentation of the carrier's position on those jobs, (2) the General Chairman of the "CStPM&O" District also appeared at the prefatory meetings of January 18 and June 28, 1966, and the general meeting of June 9, 1969, and additionally at a meeting on the morning of May 15, 1969, but the only reference to individual jobs on the "CStPM&O" District occurred at the May 15 morning meeting when the parties identified the jobs involved but did not discuss their manning requirements, and (3) the General Chairman of the "CGW" Dis-

trict appeared only once, on the afternoon of May 15, 1969, at which time the carrier only listed the jobs involved but did not have time to even present its position on manning requirements for those jobs.

26. Mediation under the auspices of the National Mediation Board commenced on June 2, 1969, with the parties meeting separately with the mediator. When the parties met on June 3, 1969, I pressed for a recess in mediation in order to give the carrier (and the UTU if it wished) time to prepare studies. My proposal met with resistence; and I was prompted to ask the UTU representatives what concrete evidence they had on the question of whether or not additional men were needed on crews. General Chairman Maloney responded in substance as follows:

> ". . . [I]n the country as a whole it can be seen what happened. On one railroad 600 jobs were worked one and one and all are back on [*i.e.*, being operated at "1 and 2"], and on another railroad 450 were off and all but eight are back on. . . . If we do this study, where will we end up? . . . No matter how many time-studies may have been made, other railroads have been settling for an average of 90% [of the crews at "1 and 2"]. . . . Time-studies could not have played a very important role in these dispositions."

When I replied that we were now talking about the C&NW and not about other carriers, Mr. Maloney's answer was that

> "the Burlington, the Milwaukee Road, and the Great Northern have returned their crews to a "1 and 2" consist and the [C&NW] crews should now be returned to a "1 and 2" consist the same as these other railroads."

When I again pressed for the study of individual jobs, Mr. Maloney stated that he was

> "of the firm belief that time-study or no time-study, the organization would seek and gain an agreement by saying: 'here is what the Milwaukee, the CB&Q, and the Great Northern have done, and this is what the [C&NW] is going to have to do.' "

UTU Assistant Vice President Moore added that President Luna had stated that in a single yard all the jobs working side by side must be returned to a "1 and 2" crew consist. Later, after lunch, at the suggestion of the mediator the parties did agree to a two-week recess so that job studies could be made. Nevertheless, Mr. Moore then made the statement that he

> "presume[d] that the study [was] for the carrier's benefit and not for any purpose of the employees, since [he] do[es] not intend to change [his] position in any way relative to insisting on a return to a "1 and 2" crew consist."

Moreover, Mr. Moore stated that he does not think that the C&NW is any different from the other railroads which have already agreed to return their employees to a crew consist of "1 and 2."

27. Mediation sessions resumed on June 18, 1969, with a discussion of the methods which the carrier had used in conducting its job studies. General Chairman Maloney asked at the start if all the time that was injected into these studies wasn't "pointless," because

> ". . . on all of these various railroads across the country agreements eventually resulted which put the men back to work regardless of the studies."

Mr. Maloney then made a written proposal to settle the dispute. In general, the proposal provided that all crews on the railroad be operated at "1 and 2." Mr. Maloney stated –without giving any details–that this proposal was based upon "a comprehensive study of [his] own relative to crew consist." Moments later he asked the carrier to make a counterproposal and said that he did "not give a damn about the carrier's time and motion study."

28. The meeting of the parties on June 20, 1969, was brief. It was not attended by all the union's representatives, and the only subject discussed was the carrier's latest proposal. This called for restoration of five yard and 2 branch line jobs to "1 and 2" status, for further reductions

of other yard and branch line crews to "1 and 1," and reductions to "1 and 1" in mainline through freight in accordance with the carrier's long-standing proposal that reductions be made in that area of the C&NW's operations.

29. On June 24, 1969, the carrier received the UTU's next proposal through the mediator. This called for a "1 and 2" consist on all the carrier's crews except for 8 yard crews and 3 branch line road crews. On June 25, the parties met again and discussed at length the union's proposal. I gave all my reasons why the carrier could not accept such a return to larger crews, and Mr. Maloney responded in a way which once again demonstrated the union's hostile attitude toward discussing crew consist on the merits:

> "I will not sit here and argue whether or not these men are needed. I believe they are needed."

I brought up the subject of mainline through freight service and said that in my view the Award of Arbitration Board No. 282 did not go far enough in resolving the crew consist question because it excluded consideration at that time of reduction in mainline. Again Mr. Maloney's response summed up the union's attitude; for he said that while the parties were not then discussing the carrier's proposal.

> "when we do get to that proposal, the organization is definitely not going to agree to any change in crew consist on mainline or through freight jobs."

In other words, the union just wasn't going to bargain at all on the C&NW's proposals for reductions in mainline. When the carrier's proposal did come under discussion, Mr. Maloney said that if he accepted that proposal he would be going

> "far beyond his responsibility as General Chairman in this case."

The meaning of Mr. Maloney's words was clear to me: He did not have the authority from his national office and from President Luna to agree to any settlement which retained a substantial number of yard and branch line crews

at "1 and 2" or which granted any of the reductions sought by the carrier's proposals in mainline. After another brief discussion this meeting ended.

30. Four further meetings were held by the parties with a mediator between June 26 and July 2, 1969. These meetings in the main consisted of arguments over the "pros and cons" of the different proposals, and little progress was made toward reaching an agreement. At all times the union representatives insisted that the C&NW would have to make an agreement like the other carriers on which there have been settlements on the crew consist issue, and especially like the agreements reached on the Milwaukee Road; the Great Northern; and the Chicago, Burlington & Quincy. At one point in the parties' meeting on June 30, 1969, BRT General Chairman Maloney seemed to sum up the union's final position:

> ". . . [T]he employees on the [C&NW] are going to insist on an agreement comparable to the agreements obtained by their fellow workers on other railroads in the mid-west."

31. On July 2, 1969, the mediator announced that in his view mediation had failed and that he was so reporting to the Mediation Board. No further mediation sessions were held. In October, 1969, the Mediation Board proffered arbitration to the parties. The C&NW promptly accepted, but when the union declined, the Board terminated its services in this dispute on October 16, 1969.

32. On November 11, 1969, conferences resumed at my request with UTU Vice President Francis Tuffley and the various General Chairmen present to represent the union. When this meeting opened, I first inquired of Vice President Tuffley if the union intended to delay their strike. Mr. Tuffley responded that the union would not strike as long as conferences continued to progress, but that he did not envision conferences continuing beyond one week. During the next seven days the parties met in the offices of the C&NW, during which time we identified the crews

involved in this dispute and discussed our positions. At no time, however, did the union alter its refusal to even consider the carrier's Section 6 notice on main line crews or in any way deviate in its offers to dispose of the dispute from the agreement results made with other railroads.

[Subscription and notarial certificate omitted in printing.]

EXHIBT A

General Grievance Committee
BROTHERHOOD OF RAILROAD TRAINMEN
Chicago & North Western Railway

Chicago, Illinois
July 6, 1965

Mr. T. M. Van Patten
Director of Personnel
C. & N. W. Railway
Chicago, Illinois 60606

Dear Sir:

The undersigned, representative of the Road Trainmen of the Chicago & North Western (Proper) Railway Company, under existing agreements between management and the Brotherhood of Railroad Trainmen, has been authorized under the laws and rules of procedure of the organization, to submit to you notice of desire to change, effective January 26, 1966, the said agreements as set forth below:

> Consist of crews in road service: "Effective January 26, 1966 a rule shall be inserted into the respective agreements between the parties applying to Brakemen (trainmen) which will provide that crews in road through freight service shall consist of not less than two (2) Brakemen (trainmen).

UTU Assistant Vice President Moore added that President Luna had stated that in a single yard all the jobs working side by side must be returned to a "1 and 2" crew consist. Later, after lunch, at the suggestion of the mediator the parties did agree to a two-week recess so that job studies could be made. Nevertheless, Mr. Moore then made the statement that he

> "presume[d] that the study [was] for the carrier's benefit and not for any purpose of the employees, since [he] do[es] not intend to change [his] position in any way relative to insisting on a return to a "1 and 2" crew consist."

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In other words, the union just wasn't going to bargain at all on the C&NW's proposals for reductions in mainline. When the carrier's proposal did come under discussion, Mr. Maloney said that if he accepted that proposal he would be going

> "far beyond his responsibility as General Chairman in this case."

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[Subscription and notarial certificate omitted in printing.]

EXHIBIT A

General Grievance Committee
BROTHERHOOD OF RAILROAD TRAINMEN
Chicago & North Western Railway

Chicago, Illinois
July 6, 1965

Mr. T. M. Van Patten
Director of Personnel
C. & N. W. Railway
Chicago, Illinois 60606

Dear Sir:

The undersigned, representative of the Road Trainmen of the Chicago & North Western (Proper) Railway Company, under existing agreements between management and the Brotherhood of Railroad Trainmen, has been authorized under the laws and rules of procedure of the organization, to submit to you notice of desire to change, effective January 26, 1966, the said agreements as set forth below:

> Consist of crews in road service: "Effective January 26, 1966 a rule shall be inserted into the respective agreements between the parties applying to Brakemen (trainmen) which will provide that crews in road through freight service shall consist of not less than two (2) Brakemen (trainmen).

Crews in way-freight service shall consist of not less than three (3) Brakemen (trainmen) on the following main lines:

Between Chicago and Council Bluffs
Between Chicago and Elroy
Between Chicago and Milwaukee

Crews in suburban passenger service shall consist of not less than two (2) Brakemen (collectors)

Therefore, in accordance with the provisions of the Railway Labor Act, as amended, and current agreements covering rates of pay, rules and working conditions of the employees herein covered, you will please accept this as formal notice of our desire to change the said agreements as set forth above.

Please reply to this proposal in writing to the undersigned General Chairman within ten days, fixing date within the provisions of the Railway Labor Act when conference with you may be had for the purpose of discussing these matters.

Yours truly,

/s/ Norman Speigal
Chairman, G.G.C.

cc: Mr. Charles Luna

EXHIBIT B

General Grievance Committee
BROTHERHOOD OF RAILROAD TRAINMEN
Chicago & North Western Railway

Chicago, Illinois
July 6, 1965

Mr. T. M. Van Patten
Director of Personnel
C. & N. W. Railway
Chicago, Illinois 60606

Dear Sir:

The undersigned, representative of the Yardmen and Switchtenders of the Chicago & North Western (Proper) Railway, under existing agreements between management and the Brotherhood of Railroad Trainmen, has been authorized under the laws and rules of procedure of the organization, to submit to you notice of desire to change, effective January 26, 1966, the said agreements as set forth.

> Consist of crews in all yards, which shall provide that "Effective January 26, 1966, a rule shall be inserted in the respective agreements, between the parties applying to yard service employees, which will provide that train and yard crews in all classes of yard service, including Transfer, Interchange, Yard Work Trains, shall consist of not less than one (1) conductor (foreman) and two (2) brakemen (helpers).
>
> Yard crews employed at Proviso Hump Yard to consist of not less than one (1) conductor (foreman) and three (3) brakemen (helpers)

Therefore, in accordance with the provisions of the Railway Labor Act, as amended, and current agreements covering rates of pay, rules and working conditions of the employees herein covered, you will please accept this as formal notice of our desire to change the said agreements as set forth above.

Please reply to this proposal in writing to the undersigned General Chairman within ten days, fixing date within the provisions of the Railway Labor Act when conference with you may be had for the purpose of discussing these matters.

Yours truly,
/s/ Norman Speigal
Chairman, G.G.C.

cc. Mr. Charles Luna

EXHIBIT C

December 24, 1965

File 69-2-34-Trnm. C&NW
69-2-34-Ydmn. C&NW

WJF:a

Mr. N. Spiegel
14 East Jackson Boulevard
Chicago, Illinois 60604

Dear Sir:

This has reference to our previous correspondence concerning your purported Section 6 notices of July 6, 1965 relating to crew consist:

As I previously informed you, without waiving the carrier's position as to the prematurity and impropriety of your requests, the carrier reserved the right to file such proposals as it may consider appropriate for concurrent handling with your requests when considered appropriate to do so.

We hereby give notice, under our existing agreement or agreements and pursuant to the provisions of the Railway Labor Act, that we propose to revise and supplement such agreement or agreements in accordance with the proposals set forth in "Attachment A" appended hereto, such proposals to be considered and progressed concurrently with

your notices of July 6, 1965. It is suggested that the initial conference on the carrier's proposals be held at 10:00 a.m., Tuesday, January 18, 1966, at 400 West Madison Street, Chicago, Illinois, at which time we will also discuss the organization's proposals.

As a matter of information we have suggested the same time and place for conference with the other BRT General Chairmen relative to identical notices being served on them by the carrier for concurrent handling with proposals served by them which were similar to those forwarded with your letters of July 6, 1965.

Please acknowledge receipt of this notice and advise if the proposed time, date and place for holding the initial conference are agreeable to you.

In the event that we are unable to reach an agreement upon the organization's and carrier's proposals at such conference, we further propose that the matter be handled on a joint national basis. In accordance with established procedure which has been followed in the railroad industry on numerous occasions during the last fifty years, if an agreement is not reached in our conferences, this carrier will join with other carriers serving a like notice upon their employes represented by the Brotherhood of Railroad Trainmen in the creation of regional Carriers' Conference Committees which, in conjunction with the National Railway Labor Conference, will be authorized to represent it in progressing the matter to a conclusion. It is requested that you join with representatives of the employes on other carriers who are receiving like proposals in the creation of an Employes' National Conference Committee to negotiate to

a conclusion, in accordance with the provisions of the Railway Labor Act, the subject matter of these proposals.

Yours truly,

(Signed) T. M. Van Patten

BC: Mr. J. F. Griffin - See your Circular No. 229-5 of December 21, 1965.

T.M.V.P.

BBC: Messrs. S. C. Jones
L. S. Provo
J. J. Hillman

BBBC: Mr. B. W. Heineman

ATTACHMENT A TO EXHIBIT C

CONSIST OF CREWS

Consist of Road and Yard Crews

A. Eliminate all agreements, rules, regulations and practices, however established, applicable to any class or grade of train or yard service employes, which require the employment or use of

(i) a stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen or flagmen) in any crew used in any class of road service, including all miscellaneous and unclassified services, or

(ii) a stipulated number of brakemen or helpers in any crew used in any class of yard, transfer or belt line service, including all miscellaneous services to which mileage rates do not apply.

B. Establish a rule to provide that

1. Management shall have the unrestricted right, under any and all circumstances, to determine when and if trainmen (assistant conductors, ticket collectors, baggagemen, brakemen and flagmen) shall be used in each crew employed in all classes of road service, including all miscellaneous and unclassified services, and if used the number and classification of employes who will be so used; and when and if brakemen or helpers shall be used in each crew employed (including yardmen who work independent of a yard crew) in all classes of yard, transfer and belt line service, including all miscellaneous services to which mileage rates do not apply, and if used, the number and classification of employes who will be so used.

2. All agreements, rules, regulations, interpretations and practices, however established, which conflict with the provisions of this rule shall be eliminated.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

AFFIDAVIT OF LARRY S. PROVO ON BEHALF OF THE PLAINTIFF, CHICAGO AND NORTH WESTERN RAILWAY COMPANY

* * * * *

1. I am President and Chief Executive Officer of the Chicago and North Western Railway Company (hereinafter referred to as the "C&NW" or the "carrier"), * * *

* * * * *

6. * * * Any strike or work stoppage forcing the railroad to terminate its operations will endanger this investment of $1,276,632,000 and deprive the C&NW of $750,000 in revenue for each day it continues. Considering only the

loss of traffic during the strike to competing forms of transportation understates the injury to the corporate investment, as the experience of this industry has been that customers lost to competitors during strikes are often not regained on the resumption of normal services.

7. The C&NW is in such critical financial condition that restoration of unneeded jobs will have a serious impact upon the ability of the railroad to continue to provide the public with effective transportation service over its extensive 11,500 mile system. Our marginal economic nature is a matter of public record. The C&NW has had ordinary income deficits in five out of the last ten years. During the period 1963-1966, when wages and price levels remained reasonably stable, the C&NW enjoyed a modest net income from operations. Beginning in 1967, however, we began suffering deficits, a trend which has accelerated in 1969– in the first six months that deficit exceeds $11.2 million, creating a working capital deficiency at the end of the first half of 1969 exceeding $12 million.

* * * * *

9. * * * Upon the rendition of the Award of Arbitration Board No. 282 this management examined the work of our crews to determine where the manning of trains could be reduced consistent with an efficient operation. At that time, our trains were generally manned with a minimum consist of one conductor and two brakemen (*i.e.*, "1 and 2"). The C&NW then utilized the procedures of Section III(A) of the Award to effect those reductions. * * * As a result of agreements and awards so obtained, the C&NW was authorized to eliminate, as soon as attrition permitted, unneeded brakemen on approximately 200 crews.

10. The C&NW presently operates approximately 760 crews a day on the whole railroad, of which 429 are in yard service and 331 are in road service. Of the 331 crews in road service, 186 work on main lines (where the provisions of Award No. 282 did not apply) and 145 work on branch lines. Presently, pursuant to the authority of

the above-mentioned agreements and awards, the C&NW operates 128 crews in yard service (out of a total of 429) with a consist of either one conductor and one brakeman (*i.e.*, "1 and 1") or only one conductor, and 51 crews in road service on branch lines (out of a total of 145) with a consist of "1 and 1." Reductions on these 179 crews today represent an annual savings of $1,548,639 to the C&NW, a figure which increases annually as further attrition permits realization of the full benefits of our awards and agreements. Considering the critical financial condition of the C&NW, elimination of this annual savings of $1,548,639 would aggravate our present working capital deficiency and make even more impossible the modernization of our property, which is the only hope for the future if this railroad is to furnish the shipping public with needed transportation services.

11. Almost eighty percent of this railroad's 11,500 mile system consists of branch lines, many of which were constructed in the 19th Century to serve markets which have since shifted. Since these branch lines are marginal economic operations producing only a minimum amount of traffic today, they must be abandoned when rising expenses create deficits so great that their continuance can no longer be justified. The addition of unproductive employees to the 51 branch line crews presently working with a consist of "1 and 1" will only weaken the viability of those branch lines and accelerate their abandonment, to the detriment of the remaining shippers dependent on that service.

[Subscription and Notarial Certificate omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

TEMPORARY RESTRAINING ORDER

This matter came to be heard upon the plaintiff's motion for a temporary restraining order, supported by the verified complaint herein, an affidavit of James E. Wolfe, an affidavit of James R. Wolfe, and an affidavit of Larry S. Provo, from which it appears that the defendant, United Transportation Union has threatened a strike against the plaintiff, and that this strike and picketing will cause immediate and irreparable injury, loss, and damage before a hearing can be had on the plaintiff's motion for preliminary injunction, in that the plaintiff will be forced to suspend the transportation of passengers and freight in interstate commerce, with the consequences that if the strike is not restrained the plaintiff will be deprived of hundreds of thousands of dollars in revenues for each day the strike continues, many of its employees will be deprived of their employment and wages for the duration of the strike, many businesses will be deprived of essential transportation services, and railroad transportation in a large area of the United States may be seriously impaired, so as to impede seriously or interrupt altogether the transportation in interstate commerce of passengers, mail, freight, and express lading (including government mail and express, military personnel, and material), and food and other lading essential to the public health and safety.

IT IS THEREFORE ORDERED that the United Transportation Union, each of its divisions, lodges, officers, agents, servants, counsellors, and members, and all persons acting by, through, and for it, be and they are hereby temporarily restrained from authorizing or engaging in any strike against or picketing of the plaintiff over any dispute as to the proper consist of road and yard crews;

That this temporary restraining order be granted on the condition that an undertaking in the sum of *$5,000.00* be filed to make good such damages not to exceed said sum as may be suffered or sustained by any party who is found to be wrongfully restrained;

That the defendant be and is hereby directed to show cause, before this Court at *2:00 P.*M. on *November 28,* 1969, why the plaintiff's motion for preliminary injunction should not be granted;

That this temporary restraining order shall expire at *8* o'clock *P.*M. on *November 30,* 1969, unless it is further extended by order of this Court; and

That this temporary restraining order may be served by any person over the age of eighteen years, selected for that purpose by the plaintiff.

Dated: 8 o'clock P.M.
November 19, 1969

J. Sam Perry
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption Omitted in Printing]

MOTION TO VACATE
TEMPORARY RESTRAINING ORDER

Now comes the defendant, UNITED TRANSPORTATION UNION, a voluntary unincorporated association, by JOHN J. NAUGHTON, its attorney, and moves This Honorable Court to vacate the Temporary Restraining Order entered herein without notice to defendant on November 19, 1969, on the grounds that:

1) The Complaint fails to state a claim upon which relief can be granted;

2) The plaintiff's attorney failed to certify to the court his efforts, if any, to give notice to the defendant or its attorney and the reasons why notice should not be required, and

3) The issuance of a Temporary Restraining Order is not necessary for the prevention of irreparable injury to the plaintiff as more fully appears from the Affidavit of Francis D. Tuffley attached hereto.

[Subscription omitted in printing]

AFFIDAVIT

FRANCIS D. TUFFLEY, being first duly sworn, on oath deposes and says:

1) That he is a Vice President of the UNITED TRANSPORTATION UNION, the defendant in this cause, and is assigned to the dispute between the said Union and the Chicago and North Western Railway Company which is set out in the Complaint;

2) That as part of such assignment, he participated in a preliminary conference on the property on August 6, 1968 which is referred to in paragraph 17 of the Affidavit of James R. Wolfe. Though this was a mere preliminary conference, he came to the opinion, at that time, that the demands of the railroad were so different than demands on other railroads that he did not feel they could be justified. He not appeared in the conferences after the mediation had expired and arbitration had been declined. As part of his preparation for this appearance, he reviewed the conferences at which he had not been present. He then got in touch with Mr. James R. Wolfe, by telephone, and requested that conferences be resumed. After several phone calls, it was agreed to resume conferences on November 12, 1969. In the course of those conferences, we discussed each crew individually and our respective positions. Neither party

insisted that all crews had the same consist. The disagreement was over specific crews. In the course of that conference, we agreed to withdraw all of our requests for a crew consist of 1 and 3;

3) The carrier's counter-proposal Section 6 Notice was discussed in those conferences in that the subject matter was consistently discussed;

4) At no time did we make an adamant demand that an agreement on the C&NW had to be identical with agreements on other railroads and, in fact, this would have been impossible since those agreements differed;

5) At no time did we demand that any agreement could not be less favorable than the most favorable crew consist agreement reached on any other railroad;

6) In the course of the negotiations, the Union had refused to agree to engage in National handling of this dispute, but subsequently National handling became impossible because most of the other railroads entered into crew consist agreements. In the post-mediation conferences, no request for or mention of National handling was made;

* * * * *

[Subscription and notarial certification omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

AMENDMENT TO VERIFIED COMPLAINT

Now comes the plaintiff, Chicago and North Western Railway Company, a corporation, by its attorneys, James P. Daley, Robert Schmiege, William H. Dempsey, Jr. and David Booth Beers, and pursuant to Rule 15(a) of the Federal Rules of Civil Procedure hereby amends the Verified

Complaint filed on November 20, 1969 in the following respects:

1. Paragraph 5 of the Verified Complaint is amended to read as follows:

> "5. The BRT notices and carrier counter-notices referred to in Paragraph 4 above were discussed by the parties in conferences held on the property of the carrier, but no agreements were reached. The dispute was also the subject of mediation under the auspices of the National Mediation Board. However, mediation failed to produce any agreements, and the Mediation Board urged the parties to submit the dispute to arbitration. The C&NW accepted, but when the BRT declined, on October 16, 1969, the Board terminated its services."

2. Paragraph 8 of the Verified Complaint is amended to read as follows:

> "8. The plaintiff disagrees with the position of the UTU set forth in Paragraph 7 above. The plaintiff takes the position that it has complied with the requirements of Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First) 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions' in the present dispute. The plaintiff takes the further position that the UTU has not complied with the foregoing requirements of Section 2 First of that Act in that:
>
> First: Having insisted in the foregoing dispute upon bargaining separately with the plaintiff carrier instead of bargaining jointly with all the railroads upon which the BRT had served like notices, nevertheless
>
> (a) The defendant has refused to bargain on the proposals in the carrier's counter-notices to reduce the size of main line crews;
>
> (b) The defendant has insisted that any agreement on the C&NW must conform to the results of the agreements reached on the other railroads upon

which the BRT served like notices without any consideration given to conditions existing on the C&NW;

(c) The defendant has entered negotiations with a fixed position and a determination not to deviate from the position regardless of what relevant consideration might be advanced by the C&NW; and

Second: Notwithstanding the foregoing, the defendant has refused to engage in national handling of this dispute and to negotiate on a joint basis a national crew consist agreement with all the railroad on which the BRT served like notices.

[Subscription and certificate of service omitted in printing]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

VERIFIED ANSWER TO VERIFIED COMPLAINT

Now comes the UNITED TRANSPORTATION UNION, a voluntary, unincorporated railroad labor association, organized under and existing by reason of the provisions of the Railway Labor Act, by John J. Naughton and John H. Haley, Jr., its attorneys, and for its Answer to the Verified Complaint says:

FIRST DEFENSE

The Verified Complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

This Court lacks jurisdiction, pursuant to the Norris-LaGuardia Act, 29 USC 101 (et seq.) to grant the relief prayed for in the Verified Complaint.

THIRD DEFENSE

This defendant states that the plaintiff, throughout the handling of this dispute, has been guilty of bargaining in bad faith and has failed to exert every reasonable effort to settle the instant dispute and further avers that this plaintiff-railroad, along with many other United States railroads, has been held to have been guilty of bargaining in bad faith by the Opinion and Judgment of the United States Court of Appeals, for the District of Columbia in *BRT v. Akron & Barberton Belt R. Co.*, 385 F.2d 581, 597, 598 (1967). Certiorari denied, 390 US 923. Defendant further avers that plaintiff-railroad has consistently attempted to develop a case to prosecute in the courts rather than make an effort to arrive at an agreement as to the crew consist rule.

FOURTH DEFENSE

1) Defendant admits this is an action for an injunction but denies all other allegations contained in paragraph 1;

2) Defendant admits the allegations contained in paragraphs 2 and 3 of the Complaint;

3) Defendant admits the allegations contained in paragraph 4.

4) Answering paragraph 5, defendant admits that the BRT Notices and the carrier counter-notices were discussed by the parties in informal conferences held on the property of the carrier but avers that the carrier took the position that those Notices were premature when they were served in 1965 and continued to hold that position until January of 1968 when this dispute over "prematurity" was finally resolved in the defendant-union's favor by the denial of a Petition for a Writ of Certiorari by the United States Supreme Court. Defendant also admits that this dispute was mediated under the auspices of the National Mediation Board and that there were no agreements as the result of this mediation. Defendant avers that plaintiff never intended to reach an agreement but that, instead, it sought

to exhaust the mediation process so that it could bring a law suit seeking to permanently enjoin any self-help by the union over the dispute set out in Section 6 Notices. Defendant admits the Mediation Board terminated its services and that the C&NW accepted the arbitration and that the BRT declined. Defendant further admits that on October 16, 1967 the Board terminated its services;

5) Answering paragraph 6, defendant admits that the BRT was succeeded as an entity by this defendant and further admits that the individual negotiators for the two organizations have been, for the most part, the same throughout but denies that the positions now taken in this dispute by the UTU are the same as those formerly taken by the BRT;

6) Defendant admits the allegations contained in paragraph 7;

7) Answering paragraph 8, defendant admits that the plaintiff-railroad is taking a position. Defendant avers that that "position" is without any merit and that it is taken for the purpose of delaying the eventual signing of a crew consist rule. Defendant states that plaintiff is barred from taking the position that it exerted every reasonable effort to make and maintain agreements in the face of the holding by the Court of Appeals, for the District of Columbia, that it did not take such action. Further answering paragraph 8, defendant asserts that it has bargained on the carrier's counter-notices; that it has given consideration to conditions existing on the C&NW; and that it has not entered negotiations with a fixed position and with the determination not to deviate from that position. Defendant admits that it had refused to engage in National handling of this dispute at an earlier time and avers that this refusal was held to be proper by the United States Court of Appeals for the District of Columbia in *BRT v. Atlantic Coast Line*, 383 F.2d 225 (1967); that there is no distinction that can be drawn between the position of the 3 railroads immediately involved in that dispute and the position of the

plaintiff here and that, in fact, the railroad has not requested any National handling of this dispute in conferences between the parties, either during those conferences held in mediation and those conferences held after the mediation of this dispute. Defendant denies each and every other allegation contained in paragraph 8;

8) Defendant denies that it has threatened to strike the plaintiff. Defendant avers that any strike or exercise of self-help, which might be called, would not be in violation of the Railway Labor Act;

9) Answering paragraph 10, defendant admits that any strike called by it, if successful, would in varying degrees bring the operation of the C&NW to a halt. Defendant avers that no commuter service of the plaintiff would be disrupted since it is the policy of this organization to maintain commuter services on railroads in the Chicago area in every strike situation. If those commuter services are not maintained, it will be solely because the railroad itself has decided not to maintain them. Defendant admits that the plaintiff will lose revenues in an indeterminate amount if a strike is called and is successful. Defendant denies all other allegations in paragraph 10;

WHEREFORE, defendant denies that plaintiff is entitled to the relief or any part thereof requested in the prayer of its Verified Complaint and asks that the Verified Complaint be dismissed at the plaintiff's costs and that the defendant be allowed all the costs incurred herein through the issuance of the Temporary Restraining Order and for those costs which occur or may occur after the issuance of the said Temporary Restraining Order, and specifically requests that the costs assessed against the plaintiff include a reasonable attorney's fee.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption omitted in printing]

[1] **TRANSCRIPT OF PROCEEDINGS**

had in the above-entitled cause before the Honorable J. SAM PERRY, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, commencing on Tuesday, December 2, 1969, at the hour of 2:00 o'clock, p.m.

* * * * *

[16] JAMES E. WOLFE

called as a witness by the plaintiff herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHMIEGE:

* * * * *

[17] Q. As an introduction, Mr. Wolfe, would you tell us what your experience has been in the railroad industry? A. Yes. I entered the service of the Chicago Burlington & Quincy Railroad Company at Hannibal, Missouri on February 2, 1918. * * *

* * * * *

[18] A. I was assistant to the executive vice-president, assistant vice-president, and finally vice-president in charge of personnel and labor relations matters for the Burlington System, that is, the Chicago, Burlington & Quincy, the Fort Worth and Denver, and the Colorado Southern. During that period a great part of it I was a member of the Carriers' Conference Committee representing the Western Railroads. I finally became permanent chairman of the Western Carriers'

Conference Committee [19] and the Committee on Labor Relations for the Western Railroads.

Then the National Railway Labor Conference was created to handle labor matters at the national level for practically all of the railroads in the industry. When that organization was created, I was selected to be its chairman. * * * I represented the railroads when this dispute and many disputes that were in existence at the time before Emergency Board No. 154. * * * The dispute, as Mr. Haley stated to the Court, involving the L&N, the Illinois Central, and the Belt, I did [20] some work for those railroads.

Q. This was after your retirement? A. Yes, that was after my retirement.

Q. Mr. Wolfe, could you explain to the Court, please, what a Carriers' Conference Committee is? You referred to the fact that you were a member of the Western Carriers' Conference Committee. A. A Carriers' Conference Committee is a limited number of officers from the railroads who were selected to represent the railroads within a region and the handling of disputes on a national basis. In this industry we have the Western Region, the Eastern Region, and the Southeastern Region. Disputes of that character have been handled on a national basis, about which I will testify later, for many, many years.

Q. You also referred in your testimony to the fact that you were once Chairman of the National Railway Labor Conference. Could you explain to the Court, please, what that conference is? A. Yes. The presidents of the railroads had discussed for considerable time possibility of organizing an organization which would be in charge, that is, they would have the authority to handle labor matters at the national level for all of the [21] railroads in the industry. Now I say all of the railroads. There were some small railroads that were not members of the National Railway Labor Conference, but almost without exception those railroads had stand-by agreements. When a national agreement was executed those railroads accepted the terms of such an agreement.

Q. Would you define for the Court the term "national movement" as it is used in the railroad industry? A. Yes. It has been described on several occasions by the National Mediation Board and others, but in substance, a national movement represents a dispute or the serving of identical notices by a union or a group of unions upon almost all of the railroads of the industry, or it could be that the railroads of the industry would serve almost identical notices at about the same time on a particular union or a group of unions. Where the issue or issues involved are identical and involve a great number of railroads, that, as we understand it, is a national dispute, whether it was originated by the serving of notices by union or unions, or by the railroads.

[22] Q. What has been the customary method in the railroad industry for handling these national movements that you have just described? A. Well, almost without exception, the so-called national disputes, as I stated earlier, arise out of the serving of a great number of notices. With a few exceptions, they have been handled on a national basis. The railroads give their power of attorney to the National Railway Labor Conference, or prior to the creation of that conference, to the Regional Conference committees, and the dispute or disputes are handled to a conclusion. It has worked very satisfactorily.

* * * * *

[24] MR. HALEY: May it please the Court, I dislike to interrupt Mr. Wolfe, but I think I must object to this entire line of questioning.

[25] We—Mr. Wolfe, Mr. Dempsey, Mr. Beers and I—participated in the trial of the *Atlantic Coastline v. the Brotherhood of Railroad Trainmen* in which this same testimony that is being given here now by Mr. Wolfe was given by him there. I have a transcript in my room which I have sent for of the testimony about national handling in the past as given by Mr. Wolfe and others.

The question of a duty of a union to negotiate on a national basis based on Mr. Wolfe's testimony, which was

identically before what it is starting out to be now, has been resolved. It has been resolved by the Court of Appeals for the District of Columbia; certiorari has been denied by the Supreme Court of the United States. The Courts have held that this union has not violated and does not violate any duty that it has under the Railway Labor Act by refusing to engage in national handling with respect to the crew consist dispute.

I see no reason to retry that issue before this Court. I recognize that the North Western Railroad says that it was not a party [26] to the Atlantic Coastline decision as a formal party, but it has served the identical notices that the Boston & Maine, Atlantic Coastline and Des Moines union had served. It had made the identical demand for national handling. It has gotten the identical response from the union of refusing it. The courts upheld the union. I see no point in relitigating the Atlantic Coastline case here.

If it will help the Court, as soon as it will get here, I will furnish the Court with a transcript of the testimony Mr. Wolfe is now giving that he gave in the Atlantic Coastline case. It will save us sitting here listening to this again. * * *

THE COURT: I will accept your offer to present it to me, and I will take it home with me and read it tonight and we can go on to some other subject.

* * * * *

[27] MR. SCHMIEGE: I don't understand counsel's objection.

THE COURT: I will read it all, though.

MR. SCHMIEGE: The objection that has been sustained is that we avoid material that was discussed in the Atlantic Coastline case.

THE COURT: That is right, on his representation that he will present me the transcript.

MR. HALEY: I have the joint appendix as well. I believe it includes it all. It was agreed that that was sufficient.

THE COURT: All right. * * *

MR. SCHMIEGE: Well, at this point, then, your Honor, could I introduce certain exhibits that were also exhibits in the Atlantic Coastline case.

* * * * *

[29] MR. DEMPSEY: I should like to make a few comments about the relevance of the Coastline litigation and the Nashville litigation because Mr. Haley has raised the matter.

Now, this case is different than either of those. I think we ought to underscore that right at the outset. * * * [30] Now, I put to one side a principal issue, and that is the good faith bargaining question as it relates to assuming a predetermined position and not deviating and being unwilling to engage in negotiate in meaningful negotiations. Another witness will speak of that more prominetly than Mr. Wolfe. And that is sort of, more or less, a garden variety kind of good faith bargaining issue that turns on the facts of the case.

The other aspect, however, of the good faith bargaining argument in this case does relate in a very important way to the kinds of issues that were litigated in the Coastline case in the District of Columbia. This brings into play the question of national as against local handling of railway labor disputes.

Now, Mr. Haley suggests that what we are doing here is relitigating Coastline. That in a sense is true. But in a much more important sense, it is not true. We are not simply here asking this Court to come to a conclusion [31] different with respect to the C&NW than the District of Columbia Court of Appeals came to with respect to the several roads involved in that litigation.

What we are saying has, rather, two aspects to it in connection with the Coastline litigation.

In the Coastline case, the Court decided, as your Honor is aware, that in the crew consist controversy, the union was free to engage in local handling because in the Court's judgment based on the evidence of record in that case, local handling—that is, handling with a view toward local consid-

ıtions as opposed to national uniformity—would be the ost promising method of resolving this dispute peacefully. Now, we say in the first place as to that that our evidence ll show in substance that the union has not followed the ndate of the Coastline decision; that it, indeed, has not rgained on a local basis with a view toward local consid- ıtions, but rather has been governed by considerations of mpelling national uniformity.

[32] But beyond that we say this: In substance, what r argument is with respect to Coastline is that had the strict of Columbia court had the benefit of the unfold- of the facts of negotiations that occurred in the wake the Coastline decision on the principles that it applied arriving at its result, its result would have been the oppo- e.

That is to say, if instead of Mr. Luna testifying in Coast- e as he did, that this was a matter as to which National iformity was not necessary, but rather had he testified t the union would be looking in negotiations toward uring substantial national uniformity, then it seems to quite evident that one simply has to read the Coastline ision and see that the result there would have been dif- ent.

So, in the sense that we are relitigating Coastline, we are ng it on the basis of considerable subsequent actual bar- ning experience. We suggest that that is highly relevant this case.

[33] Now, of course, we are entirely agreeable to short- ting the introduction of testimony, so, therefore, we cer- nly will follow your Honor's suggestion that so far as the tory behind the 1959 services of notices is concerned, that Wolfe gave in the Coast Line litigation, we are prepared rely upon the transcript of the Coast Line case as well upon Mr. Wolfe's affidavit which is on file here. But t is not by any means to suggest that that background not relevant to the arguments that we advance to this urt.

* * * * *

Now so far as the Nashville litigation is concerned I would just like to make one observation: As Mr. Haley has said, that case was tried for about a week. The restraint there [34] against the strike was extended several times. It finally amounted to about a month's restraining order. The case was never actually decided because of an interim settlement between the parties.

* * * * *

In connection with the litigation, however, in describing the litigation, Mr. Haley advanced to your Honor as a reason for dismissing the complaint the argument which I think it fair to say he pressed most vigorously in Nashville, and that is the argument basically that an injunction will not lie to enforce Section 2 First after exhaustion of the formal procedures of the Act, that is, after mediation has been completed and after an emergency board has settled–

THE COURT: That is really the question here, isn't it?

MR. DEMPSEY: Yes, it is, but the important [35] intervening fact, that is intervening between Nashville and this trial is that that issue has been decided against Mr. Haley's position by the Fourth Circuit Court of Appeals in the Piedmont case decided last September. The case is cited in our brief. I believe your Honor has been supplied with copies of it. I did not want to let the occasion pass without drawing your Honor's attention to that with respect to that central legal issue. Thank you.

[36] THE COURT: You may proceed with the further examination of this witness.

* * * * *

[40] MR. SCHMIEGE: Before we broke off, your Honor–

MR. HALEY: Excuse me before you get going.

May the record show that I now hand to the Court, which I have shown to Mr. Dempsey, a copy of the Joint Appendix in Brotherhood of Railroad Trainmen v. Atlantic Coastline Railroad Company, No. 20718 United States Court of Appeals for the District of Columbia.

THE COURT: Pass it to me. I will have it stamped and marked.

* * * * *

42] THE COURT: It is being made a part of the rec-
o here.

* * * * *

[46] BY MR. SCHMIEGE:

). Mr. Wolfe, will you explain to the Court or define fo the Court the term "crew consist"? A. Yes. In the ra road industry when we refer to "crew consist" we have in mind the number of employees in a road train crew or a ard train crew. Now when we say "1 and 2" we mean a nductor and two brakemen. If it is in yard service the co ductor is some times referred to as the foreman and the br kemen are sometimes referred to as helpers. When we sa "a crew of 1 and 1," we reduce the number of brake- m or yard helpers from 2 to 1, otherwise my definition of and 2 is exactly the same for 1 and 1.

* * * * *

BY MR. SCHMIEGE:

49] Q. Mr. Wolfe, was the matter of crew consist in lved in any national movements prior to 1959? A. Yes, cr consist was involved in the [50] national movements in 19 7, 1949 and 1953.

* * * * *

. Did any of those disputes proceed to Emergency Bo ds? A. Yes, they did, but the time limitations of the Ra way Labor Act are such that it just wasn't possible for the Emergency Board within the time [51] limits of the law to investigate those matters. There were also, of course, in ose cases rules, notices which were served by the unions. Th were all treated the same.

* * * * *

8] Q. Will you discuss the bargaining that took place aft the commission made its report?

* * * * *

8] Q. Would you tell the Court, please, Mr. Wolfe, wh action the union took under the Railway Labor Act pri to the expiration of the award? A. Well, the union ser d notice in July 1965 of a desire to negotiate agree- me s which would require the employment of a conductor an two brakemen in all classes of road and yard service.

Q. When did the award expire? A. The award expired on January 25, 1966.

Q. So that notices were served during the term of the award? A. Yes, they were.

Q. Would you explain what those notices proposed on crew consist? A. A uniform crew consist of one conductor and two brakemen.

Q. How did this 1965 notice compare with the crew consist portion of the union's 1960 notice? A. Identical.

* * * * *

[89] Q. How were those 1960 notices handled? A. On a national basis before the Presidential Commission, Emergency Board 154 and Arbitration Board 282.

Q. How many railroads received this 1965 notice on crew consist? A. Well, there were about 80 major railroads.

The railroads in the east that entered into the so-called Luna agreement did not receive such notices.

Q. Did these notices vary at all in content from railroad to railroad? A. No. They were substantially identical. They all would have required a crew of 1 and 2.

Q. What position did the railroads that received those notices take on their legality? A. Well, we took the position—and I had not then retired—that the notices were premature, that they were being served during the life of [90] Arbitration Award 282, and we had no duty to bargain under those circumstances.

Q. What action did the railroads take under the Railway Labor Act when it received those notices? A. Well, we were certain that the question as to the life of the award would inevitably become a subject of litigation. So, in order to protect ourselves, we served a counter-proposal.

Now, if we were successful in our endeavor to prove to the Court that the B.of R.T. notices were premature, well, then we conceded that ours were, likewise, premature.

Q. Well, at what time were our notices served? A. In December of 1965.

Q. So, they were served during the term of the award, too? A. Yes, they were.

* * * * *

[92] MR. DEMPSEY: After the adjournment yesterday we went back to the drawing boards and made a determined effort to streamline our presentation of oral testimony so that we could, if possible, cut back on the trial time. We are going to do that with the remainder of our testimony. There are certain risks of breaks of continuity in our presentation associated with that, but I think if I could just sketch very briefly where we are and where we propose to go, that framework will become apparent and the parts of our affidavits that we won't be putting on by way of oral testimony will be in focus. Of course, the witnesses are available for cross examination on anything in our affidavits.

[93] Now your Honor will recall that Mr. Wolfe yesterday spent a good deal of time sketching in the historical background of the crew consist dispute, which for all practical purposes—

MR. DEMPSEY: We can mark the beginning of that history of the service in 1959 the notices that led to the litigation before your Honor in the Baltimore and Ohio case in which your Honor's judgment was affirmed by the Supreme Court. Now those historical materials are relevant to our national handling argument, but they are not as directly relevant as the events which have occurred that we are about to come to and to some extent we have gotten into already with respect not to these 1959 notices and that litigation, but rather to the notices that were served in 1965 and to the period of time after the services of those notices because that, after all, the question here bears upon what happened in this more recent segment of time and not what happened before the bringing of the Baltimore and Ohio case.

So now that Mr. Wolfe has traced the [94] history of the older dispute which is a discrete dispute and a separate one, through the Arbitration Award, Arbitration Board No. 282, we now move into the period that is directly related to this case. In detailing what has happened in this recent period with respect to the notices that gave rise to this dis-

pute, Mr. Wolfe will be concentrating upon bringing to the Court's attention the kind of representations that were made by the Union in the Atlantic Coastline litigation with respect to the kind of bargaining that should be engaged in, that is, local bargaining, not the view toward national uniformity. And then in the last part of his testimony he will be talking about his experience with respect to how the union actually did negotiate once it had the Coastline judgment in hand.

[95] There are parts that will be omitted in this history, but they are set forth in the affidavit. Now then, when we follow with our next witness, which will be Mr. James R. Wolfe, the vice-president of the Chicago North Western Railroad, then we will be talking about the actual negotiations on the Chicago & North Western during this recent period associated with these recent notices, and there, of course, we are in the area of the evidence that is the most directly related to the issue before the Court.

Now, in Mr. Wolfe's testimony, Mr. James R. Wolfe's testimony, we will be compressing very sharply a good deal of the material in the affidavits that goes to the actions that related to the Chicago & North Western in these prior periods. We are just going to rely on our affidavit for that and upon the first Mr. Wolfe's testimony. Because insofar as that previous history is concerned the position of the Chicago & North Western was for all practical purposes the same as the position of all other railroads in the country. As I say, in omitting some pieces of oral testimony we do not mean to depreciate their importance, we simply do that in [96] an effort to expedite the matter and get the most directly relevant oral testimony out before your Honor and not have the case prolonged unduly. I think that if your Honor has no questions about that, we will proceed, then, with Mr. Wolfe's testimony.

MR. HALEY: If the Court please, I don't want to assume or try to tell the plaintiff how to try their lawsuit except to say this; that I continue to urge upon the Court that the Court of Appeals for the District of Columbia Circuit and

the Supreme Court obviously did not decide the Atlantic Coast Line case on the basis of anybody's testimony. They were construing the Railway Labor Act, the requirements of it. I can hardly believe that it is relevant at all—or certainly, it seems like an erroneous concept that the decision in the Coast Line case was induced by Mr. Luna's testimony or by Mr. Wolfe's testimony. I took it that from the decision of the Court it was the Court's own conception of the requirements of the Railway Labor Act, something that hasn't changed or been changed since 1934. So, if they want to put it in, and the Court wants to hear it, I am perfectly [97] willing to sit here. But I just urge it has no relevance.

THE COURT: I do not know how relevant it is, that is the thing I was thinking of is how relevant it is what happened on those railroads. What I am coming to is what has happened here.

MR. HALEY: Of course, what happened on those railroads was, as Mr. Dempsey said, precisely the same thing happened on the North Western as happened on the Coast Line.

* * * * *

[98] MR. HALEY: We contend that is not relevant because mediations terminated and the processes of the Act have been exhausted. Of course, I am away from home and I would like to go home, but I am just as happy to stay right here. I enjoy the courtroom. I think we have got a question of law here more than a question of fact.

MR. DEMPSEY: Your Honor, the relevance of the testimony, in the first place, I don't think it is inappropriate to suggest that the Court in many cases bases its decision on the evidence of record, that is what we are suggesting here. But the relevance, the immediate relevance—

THE COURT: Yes, what is the relevance of what happened?

MR. DEMPSEY: Let me address myself to that, your Honor.

What the evidence will show is that in the Coast line litigation, the Union witnesses testified that the only appropriate way to bargain on the crew [99] consist matter is by way of negotiations based on local conditions, that is, what the curves are, what the curvatures of the tracks are, all of those things that are associated with the local circumstances on the railroad. And that a pattern of national uniformity with respect to crew consist rules was not a practical way to deal with the problem. Now then—

THE COURT: What you think is you want to offer that to show national pattern and then show what took place here; is that what you are seeking to show?

MR. DEMPSEY: What we want to show is that is what the Union representative said then, then on the Chicago North Western. We are not going to talk about negotiations on other railroads to any significant extent. We are going to concentrate on negotiations on the Chicago and North Western.

What we propose to show is that when the Unions secured that judgment and was in the position to engage in the whipsaw strike tactics, which it did engage in in order to topple the defenses of the railroads one by one, when it had that judgment it turned around and in negotiations on the Chicago [100] North Western when the Chicago North Western representative said all right, now we think there should be national handling of this dispute, but if you are going to negotiate on our property alone, then you must negotiate in terms which you said these negotiations ought to take place, that is by giving consideration to the situation on the Chicago North Western. But rather than do that we propose to show what the union did was to take from the outset and without any deviation, the firm position that no solution would be acceptable on the Chicago North Western except one that accorded with the national pattern of agreements that have been extracted from the rest of the railroads in the industry. Now that is what we propose to show.

THE COURT: Well, let us proceed even though it may be irrelevant. Let us go ahead and get it in.

* * * * *

[101] JAMES E. WOLFE

DIRECT EXAMINATION (Resumed)

LY MR. SCHMIEGE:

Q. Mr. Wolfe, when we finished yesterday you had just testified that in December of 1965 the railroads served counter-notices, and you explained why those notices were served.

Would you now tell the Court, please, what those notices proposed regarding crew consist? A. Those notices proposed that the carriers would have the right to determine the number of employees who would be employed in road train and yard crews.

[102] Q. What did those notices propose regarding the national handling of that dispute? A. The railroads proposed that if there was no disposition of the issues arising out of the notices, that the dispute be handled on a national basis.

Q. How did these 1965 notices compare with the crew consist portion of the notice that the carriers had served back in 1959? A. They were identical except the 1965 notices had nothing to do with self-propelled machines.

Q. How many railroads served this 1965 notice on the Brotherhood of Railroad Trainmen? A. 80 railroads served notices on the union.

Q. Did this notice vary at all in content from railroad to railroad? A. They were identical notices.

Q. What reply did the union make to that part of the notice that requested national handling? A. They refused to so handle it.

Q. Were there any conferences held on individual railroads over these notices? A. Yes, there were initial conferences as required by law.

* * * * *

[114] Q. Mr. Wolfe, after the Jacksonville agreement was made, did any other railroads settle the crew consist

dispute? A. Yes, there were several railroads that disposed of the dispute.

Q. Were there any more strikes over the crew consist dispute? A. The Chicago Belt Line was struck in July 1968. That strike lasted 101 days, and the L&N was struck in November of 1968.

Q. After these strikes occurred, what action did the President take under the Railway Labor Act? A. The President exercised the discretion vested in him under Section 10 of the Railway Labor Act, and appointed Emergency Board No. 172, and that Board was to hear and make recommendations on the dispute involving the L&N, the Belt Railroad, and the Illinois Central which was threatened with a strike.

* * * * *

[115] Q. What sort of proceedings did the emergency board conduct? A. They had evidentiary hearings and then mediation.

* * * * *

[117] Q. Did negotiations resume after the Board made its report? A. I understand they did.

Q. Did you participate in those negotiations? A. Yes, I met with Mr. Luna on December 23, 1968.

Q. And in what capacity were you when you met with him? A. Well, I was sort of an unattached representative of the three railroads.

[118] Q. You had been engaged by those railroads to represent them in those negotiations? A. Yes. They knew that Mr. Luna and I had been good friends for years, and they thought I might be helpful in reaching an understanding which would dispose of those issues.

Q. Would you tell us what position Mr. Luna took in those negotiations? A. Well, we were not able to make any headway, and I asked Mr. Luna if I was at liberty to inform representatives of the railroads as to his attitude in regard to the disputes that were before us, and he said he had no objection whatever to me so informing those people. Mr. Luna told me that a settlement on those railroads could not be reached unless they agreed to settlements, to

agreements substantially similar to the agreements made with the railroads at Jacksonville, which we refer to as the Jacksonville agreement.

I asked if he thought that was good faith bargaining, especially in the light of his prior position in the ACL case, that the dispute should be handled locally but that there should be studies and the final determination as to the number of men in [119] any crew should be based upon the conditions applicable to that particular crew.

Mr. Luna also flatly refused to discuss our counter-proposal dealing with through freight service.

[120] Q. Would you tell the Court now what happened to those three railroads that you had been engaged to represent? A. Well, L & N was struck on January 13, 1969. A temporary restraining order was issued. During the litigation a settlement was reached which disposed of the dispute. It was for all practical purposes identical with the Jacksonville settlement. There was immediate restoration of 50 per cent. On or about May 26, '69, a final agreement was reached restoring virtually all of the trainmen who were eliminated pursuant to Award 282.

Q. What happened to the Chicago Belt? A. Well, on April 3, '69, an agreement was reached which had the effect of restoring practically all, if not all, of the yardmen who had positions which had been eliminated.

Q. The last railroad that you were representing was the Illinois Central. What happened to that? A. The Illinois Central was struck on April 8, '69.

Q. What was the result of that strike? A. On April 13 that railroad signed an agreement almost identical with the Jacksonville agreement. [121] There was some slight variations because the Illinois Central had commuter service which the other railroads did not.

Q. What position did the Union take in its negotiations with the Illinois Central? A. The same position they had taken with all of the others, 1 and 2 or nothing. In other words, for all practical purposes, a national agreement signed locally.

Q. Mr. Wolfe, would you now explain to the Court, please, the distinction as it exists in the railroad industry and the Railway Labor Practices between the term "national handling," and the term "uniform national rule"?

* * * * *

A. Well, national handling means that committees representing the railroads on the one [122] hand and the unions on the other negotiate agreements that have national application. Now, local handling may produce the same results. You may get rules that are similar, but the union may strike the individual railroads in order to compel each railroad to do what the first railroad did irrespective of what kind of an agreement the first railroad made. It may be completely intolerable, completely unjustified. But if the union insists that the other railroads adopt the same kind of an agreement, they threaten to strike, or they do strike as they have here, first the ACL and then the Missouri Pacific, then the Chicago Belt, then the L & N, then the Illinois Central, they strike them one by one and you wind up with for what is a national agreement obtained under duress because they can strike the railroads, and you find something entirely contrary to what the Court of Appeals said when it reversed Judge Holsoff. I refer to and I quote, "A national prescription of crew size would be wholly unrealistic." But you can take the railroads one by one, strike them, threaten strike, and you get a wholly unrealistic national rule.

[123] Q. Mr. Wolfe, in your experience in the industry, is it possible to have national handling without developing a uniform national rule? Have there been any examples that you can remember? A. Oh, yes. I know of many cases where proposals were served, but they were not negotiated into agreements. Now is that what you have in mind?

Q. Yes. A. Yes. There are many such proposals. Either the Emergency Board didn't have the time to conduct a thorough investigation or for other reasons, the unions would drop a proposal or the carriers would drop a proposal.

* * * * *

Q. Has there been any national handling that developed certain national procedures but not necessarily a national rule? A. Oh, yes. There are two that I have in [124] mind; one is a national rule dealing with the extension of switching limits. It was agreed nationally that if there was necessity for extending the area in which yard crews might be used to perform switching, you would negotiate, but if you failed to reach an agreement the national agreement provided that the dispute would be submitted to final and binding arbitration. Then on June 25, 1964, just a few months after the issuance of Award 282, an agreement was reached with the five operating brotherhoods, which disposed of all of the so-called secondary issues arising out of the carriers' notice of November 2, 1959 and the notice served by the unions on September 7, 1960. Article 5 of the National Agreement of June 25, 1964 dealt with the continuance of yard crew assignments where the work involved was less than four hours in an eight-hour shift. That national agreement likewise provided for arbitration if arbitration was necessary.

Q. In both of these– A. Not exactly arbitration–well, arbitration, yes, final and binding arbitration.

* * * * *

[126] CROSS EXAMINATION

BY MR. HALEY:

* * * * *

Q. You commenced–this crew consist dispute which we are dealing now, became a dispute between the unions representing train and yard service employees a little over ten years ago? A. The Section 6 notice was served on November 2, 1959; that is correct.

Q. So it has been what we might call a bone of contention, then, for more than ten years? A. Yes, I thought Arbitration Award 282 disposed of it.

Q. Regardless, it is still a bone of contention because we are still in this courtroom today contending [127] about it, aren't we? A. Well, you are cross-examining me. I suppose you have a reason for it.

Q. I mean, isn't that right? A. Oh, yes. there is a dispute.

* * * * *

Q. It is unresolved, the dispute is, between the unions and the railroad yet? A. Yes, that is correct.

Q. This same dispute, the Chicago North Western and the railroads it has since acquired by a merger or by a stock control are still in the same dispute with the same union? A. Yes, it seems like the union is going to carry it on forever.

Q. Or the railroad, depending on your viewpoint? A. Yes. My viewpoint is as I expressed it.

* * * * *

[128] Q. Now, then the PRC of which you were a member—well, do you remember who represented the Brotherhood of Railroad Trainmen in the PRC proceedings? A. Yes, I do very well.

Q. Doc Sikes was one, wasn't he? A. Well, Doc Sites was the only Brotherhood of Railroad Trainmen member, a gentleman whom I had the very highest regard.

Q. Who unfortunately recently passed away? A. That is what I learned.

Q. Of course, at that time the Brotherhood of Railroad Trainmen represented only part—although, the majority of brakemen and switchmen? A. They represented almost all road brakemen and about 84 per cent of the yardmen.

Q. The Order of Railway Conductors and Brakemen represented conductors and some brakemen? A. They represented brakemen on the Great Northern and maybe one or two little railroads, that was all.

[129] Q. The Switchmen's Union of North America represented between—between those three unions, the Brotherhood of Railroad Trainmen, the Order of Railway Conductors and Brakemen and the Switchmen's Union of North America represented practically all of the train and the yard crews? A. That is correct.

* * * * *

Q. So that all of the parties to the crew consist dispute were participants in the formation or in the obtaining the Presidential Railroad Commission's establishment or the establishment of the Presidential Railroad Commission and its proceedings, isn't that right? [130] A. Well, your question is a little bit difficult, but I will try to answer it.

It is true that the five operating brotherhoods participated in the negotiations which culminated in the creation of the Presidential Railroad Commission, and all of the operating brotherhoods had a representative on the Commission.

Q. And, of course, I don't take it that you would represent to the Court in your testimony here that there were no discussions at all between the representatives of the carriers and the representatives of the employees in train and yard service about crew consist during the proceedings of the Presidential Railroad Commission? Crew consist was discussed, wasn't it? A. You mean in the executive sessions?

Q. Well, in the hearings, in the proceedings before the Commission. A. Oh, yes. But I understood your question to mean that we had private discussions.

Q. No, no. I mean you discussed the dispute, the crew consist dispute. A. It was before the Commission, absolutely, yes. It was considered by the parties who were [131] concerned with that dispute.

Q. There were other disputes before the Commission? A. Yes, many of them.

Q. The crew consist dispute was one, and it was considered too like the others? A. That is correct.

* * * * *

[132] Q. So that crew consist got the attention of the carriers and the representatives of the employees before and during the proceedings of the Presidential Railroad Commission; isn't that right? A. Oh, yes.

Q. Then following that, the next thing that happened with further negotiations leading up to or the invocation of mediation—there were negotiations between the parties

with respect to crew consist between the time the Presidential Railroad Commission made its report and the invocation of mediation? A. Well, there weren't very many negotiations. The unions just said 1 and 2 and wouldn't talk about the PRC report. There were several discussions.

Q. You talked about them. You had a report, the Commission's report was— A. February 28, 1962. It doesn't show in the report, but that is when we delivered it to President Kennedy.

Q. Right. That was the date it was delivered.

Then there was discussion of the crew [133] consist dispute between representatives of the carriers and representatives of the employees subsequent to that? A. Yes. I thought you said negotiations. Now that you have modified it to discussions, yes.

[134] Q. And the problem was a continuing one, the dispute was a continuing one, and it was talked about; let's put it that way. Would you go that far? A. Oh, I talked about it; I should say I did talk about it. I still talk about it.

Q. You say that every time you mentioned it—who was the president of the Brotherhood at that time, was it Mr. Kennedy? A. Park Kennedy was the president, but he did not participate in the negotiations.

Q. Who did you talk to or what representative of the Brotherhood of Railroad Trainmen or Order of Railway Conductors and Brakemen or Switchmen's Union of North America did you as the representative of the carriers talk to about crew consist following the Presidential Railroad Commission? A. We talked with Mr. Sites and with Mr. Satterswhite who was assistant president. I am pretty sure Mr. Luna got in on it. As I recall, Mr. Luna succeeded Mr. Kennedy just about that time.

Q. Just about that time? A. Yes.

Q. So, in other words, it was discussed, the [135] railroads proposed disposing of it on the basis of the report of the Presidential Railroad Commission? A. And the unions said no.

Q. And the unions said no. And you talked about that not just once, but many times, is that right? A. Well, we talked about the whole report. We really didn't do much talking about individual issues. The representatives of the employees, certain representatives were lambasting the members of the Presidential Railroad Commission. And when we would meet we would want to talk about issue by issue and they would say we want no part of it. That was about all there was to it.

Q. It was still discussed? A. Yes, if you call that discussion.

Q. Now that discussion continued and mediation was later invoked? A. That is correct.

Q. By both parties? A. Yes, I think that is right.

Q. Was crew consist the subject with which the Mediation Board was concerned or did it ignore it? [136] A. No, the Mediation Board like the Presidential Railroad Commission fulfilled their duties, accepted their responsibilities, but they were woefully unsuccessful in their mediatory efforts.

Q. During the time the dispute was in mediation and it was one of the things that was in mediation? A. Yes.

Q. The mediation board undertook to secure an agreement between the unions representing train and yard service employees and the carriers with respect to crew consist, didn't it? A. We never separated, Mr. Haley, representatives of the unions. All five were there at all times. And outside of the firemen issue we did not at any time get into realistic discussions concerning any other issue.

Q. You mean realistic because you mean you didn't single it out for particular attention? A. I think that is right.

Q. But it was considered along with the other things maybe to a lesser degree? A. Let me say it this way: Practically all of our discussions dealt with the PRC recommendations [137] and what we ought to do about them. Now there was very little discussion of individual issues.

Q. But there was some? A. There was some, yes, sir.

Q. There was some of crew consist? A. Oh, yes.

Q. Just like there was some of self-propelled machines? A. That is correct.

Q. There was some of how to dispose of the last yard engine that became one of the secondary issues? A. We discussed the two Section 6 notices.

Q. And the proposals of the Presidential Railroad Commission with respect to that? A. Well, whenever the unions would stand for that, the members of the Emergency Board would attempt to talk about the PRC.

Q. The Emergency Board really—well, I am talking about the Mediation Board. We haven't gotten to the Emergency Board yet. The Mediation Board. A. Oh, the Mediation Board, well, they didn't do any talking about anything.

[138] Q. They just came in one door and went out the other? A. Yes, very hurriedly on occasion.

Q. They didn't try to perform their duty to mediate the dispute? A. It is pretty hard to enter into a meaningful discussion when one side simply says no.

Q. That was your view of the activities of the Mediation Board? A. Yes, I witnessed it.

Q. So then, the National Mediation Board, though, finally determined that it could not resolve the issues that were made by the railroads' November 2, 1959 notice and the union's September 7, 1960 notice as implemented? A. That is correct.

Q. As I understand it, the carriers offered to arbitrate and the unions refused? A. That is correct.

Q. And of course then the Mediation Board terminated its services? A. Correct.

Q. Your position is that the Mediation Board just treated it perfunctorily? [139] A. No, no. I certainly do not wish to leave that impression. They tried hard enough to talk, but the representatives of the unions wouldn't talk. They just simply said no.

Q. Who handled the mediation? A. I think Lev Edwards did most of it.

Q. Did he talk separately to the carriers? A. He talked with me many, many, many times.

Q. Do you know whether he also talked with representatives of the employees, the unions? A. I know that he did.

Q. He did? A. Yes.

Q. So then, he was a go-between at times, at least, between the carrier representatives and the union representatives? A. Well, usually it was sort of crying on my shoulder when he talked with me that he had nothing to report except no.

Q. At least he told you he had talked to the representatives of the employees? A. Yes, he told me that he was meeting them.

Q. Were there face to face talks across the table? [140] A. Yes, but not to any great extent.

Q. In other words,—but there was discussion back and forth? A. Well, we talked, if that is what you mean. I have already told you what was said. It wasn't very interesting.

Q. Then, of course, the Mediation Board terminated its services and the railroads then announced their intention to resort to self-help, put their rules into effect? A. That is correct. No, Mr. Haley. We first advised the unions that we were going to make effective the recommendations of the Presidential Railroad Commission, not our rules.

Q. Not your November 2, 1959 proposal? A. That is correct.

Q. With the termination of mediation you felt, and as you understood the law to be or the Railway Labor Act at that time, the carriers had the right to exercise self-help at that time? A. Assuming that an emergency board would not be created.

Q. So you announced your intention of taking [141] unilateral or resorting to self-help? A. That is correct.

Q. It was your understanding that that was perfectly legal? A. That is right.

Q. I believe, if I have the dates right, the Mediation Board terminated its jurisdiction on July 16, 1962 and the promulgation was set for 30 days thereafter? A. Yes, I believe those are the correct dates.

[142] Q. And then the next thing that followed was the unions filed a suit in the court in an attempt to enjoin the carriers' exercise of self-help. A. That is right.

Q. Now then at that time you were, of course, the chairman of the National Railway Labor Conference? A. No.

Q. Who was? A. We didn't have it.

Q. You didn't have it? A. Not until January 1, 1963. At that time I was chairman of the Western Carriers Conference Committee.

Q. And there were two other carriers conference committees? A. That is right.

Q. The Southern and the Eastern? A. That is correct.

Q. And was there any, at least at this time, titular head of the three conference committees? A. At that time I acted as spokesman for the railroads.

Q. For the three? A. That is right.

[143] Q. Did you have legal advice available to you at that time? A. Oh, yes.

Q. Who were your lawyers at that time? A. Well, Howard Neitzert was our general counsel, but we had several others.

Q. Let's see. There was Mr. Neitzert and– A. Lucente.

Q. Yes, Martin Lucente. A. And, well, we had several from the railroads.

Q. Your son Jim? A. Yes, he assisted in that case.

Q. He was in that case, too? A. Yes, he was.

Q. And he, of course, is now a vice president of personnel of the Chicago and North Western, one of the railroads involved here? A. That is correct. He stayed on our side.

Q. And, of course, eventually the case that started in this court at that time, or in that case you took the position that the procedures of the Railway Labor Act having

been exhausted and no Emergency Board having been appointed, the railroads were free to exercise self-help. [144] A. Yes

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Q. And then, of course, as soon as the case became final after the Supreme Court's decision, the President did establish an emergency board? A. That is correct.

Q. And that is Board No. 154? A. That is right.

Q. And that board considered the question [145] of crew consist, didn't it? A. That board considered all of the issues that were before it.

Q. Of which crew consist was one. A. That is right.

* * * * *

[148] Q. And then following that crew consist became the subject of further discussion between [149] representatives of the carriers and representatives of the unions concerned or representing yard and road service employees, between that time and the time Public Law 88-108 was enacted, during that summer, was it not? A. Well, we had some discussion.

Q. It was talked about more than casually in the talks that preceded the enactment of Public Law 88-108, wasn't it? A. Well, as you know, I think you know, Secretary of Labor Wirtz became involved, and Under-secretary Jim Randalls, and there were discussions with the parties separately and jointly. Certain proposals were submitted, one by the Secretary of Labor.

Q. And those proposals were discussed by the carriers and by the carriers and by the employees' representatives? A. Yes.

Q. They were? A. Oh, yes. We accepted the proposal made by Secretary Wirtz and the unions rejected it.

Q. Nevertheless they were discussed and considered. [150] A. I am not sure about considered. I know we considered them. What the unions did, I don't know because—

Q. You weren't there. A. The answer was the same all during those years.

Q. Then, of course, came Public Law 88-108? A. That is correct.

Q. And crew consist was testified about before the committees of the Congress that considered the legislation that became Public Law 88-108? A. Yes. I testified before the Senate Committee and the House Committee on several occasions.

Q. And so did representatives of the unions? A. Yes, I am pretty sure they did.

Q. I am sure you were there and heard it. A. I heard part of it anyway, oh, yes.

Q. So you each spoke your piece before the committees in Congress? A. That is correct.

* * * * *

[158] Q. Mr. Wolfe, are you aware that the Chicago and North Western Railroad is one of the last holdouts in this whole thing? Everybody else has been able to reach agreement with us except this outfit. A. Well, I think the–

Q. Are you aware of that? Just answer that [159] one question. A. My testimony only covers the strikes, the insistence on 1 and 2, the demands that you have on national agreements locally negotiated, entirely unrealistic. That is all covered in my affidavit and my oral testimony.

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Q. Then, of course, you were the chairman of the National Railway Labor Conference throughout and subsequent to the effective period of the award of Board 282? A. Yes, I was.

* * * * *

[161] Q. In June or July of 1965, the then Brotherhood of Railroad Trainmen commenced serving through its general chairman, notices under Section 6 of the Railroad Labor Act on various railroads seeking a rule to become effective on January 25, 1966, with the expiration of the award of Board 282 for a minimum crew consist. A. That is right.

[162] Q. And that, of course, is one of the notices that is involved in this litigation that we are in Court about here today? A. Yes.

Q. And when those notices were served by the railroads, then the railroads receiving them, I take it, reported the fact to the National Railway Labor Conference, your office here in Chicago? A. I believe you said, Mr. Haley, served by the railroads?

Q. Served by the unions. A. Served by the unions, yes.

Q. Yes. Thank you for correcting me if I said that. A. Yes, that was very promptly reported to me.

Q. Reported to you because at that time you, as the representative of the National Railway Labor Conference, had under a power of attorney the authority to act for the railroads with respect to this dispute? A. Oh, yes.

Q. So then you told, your response to the railroads was, and I take it your direction to the railroads, was don't negotiate on those notices [163] served by the union, is that right? A. I told the railroads that I thought the notice were premature and to keep me advised as to what was going on.

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[164] Q. You did tell them not to negotiate? A. I did so tell them.

Q. Right, and on your instructions the railroads refused to negotiate on those notices? A. That is absolutely correct.

Q. And then in December, following the refusal of the individual railroads, on your instructions to negotiate with the General Chairman representing the Brotherhood, the Brotherhood then sought the services of the National Mediation Board with respect to the dispute arising from those notices? [165] A. That is right.

Q. And did you oppose the National Mediation Board? Did you instruct the railroads that had been served with the notices to oppose the National Mediation Board entering the dispute? A. I opposed the National Mediation Board en-

tering the dispute because I felt the notices were premature and I advised all the railroads that I represented to that effect.

Q. But nevertheless the National Mediation Board did assume jurisdiction of the dispute arising from the union's Section 6 notices that were served in June and July of 1965? A. That is right.

Q. Then after that, in December of 1965, you instructed the railroads you represented to serve a counter-notice under Section 6 of the Railroad Labor Act on those General Chairmen who had served Section 6 notices on the railroads in June and July earlier? A. That is correct.

Q. And you also advised the railroads in serving those notices that their proposal should have two proposals in it, I should say: One, for the management to have the unrestricted right to [166] determine the size of crews and the craft to constitute the crew, and, second, national handling. A. That is correct.

* * * * *

[167] THE COURT: Why did you take the position that theirs were premature and yours not premature, or did you merely serve your notices to get your side before the mediation?

THE WITNESS: Yes, your Honor. We felt certain that the question of prematurity would eventually be in litigation, and if it should have resulted in a decision against our position we wanted to have our counter-proposal.

* * * * *

[168] BY MR. HALEY:

Q. So, in other words, it was a hedge against your being wrong about the validity of the union's notices? A. It was a hedge against erroneous Court decisions.

* * * * *

[169] Q. Then, of course, the general chairman of the Unions on which the railroad served those notices also refused to engage in national handling of them? A. I think all of them did. Undoubtedly they would have struck.

Q. Then on behalf of those railroads that had served the December 1965 notices, you applied for the services of the National Mediation Board? A. Yes, for all of them.

Q. For all of those that had been served with notices? A. Yes.

Q. And that was along about early January of 1966 that you applied—not early, late in January 1966 or early February you applied to the Mediation Board? A. Well, it was in the late winter of 1966.

Q. Before the expiration of the award. A. I am not too certain of that, Mr. Haley. Let me look at the record.

Q. We can get it. It was in the Atlantic Coastline case. A. Yes.

[170] Q. I am sure the date shows up in the Atlantic Coastline record. Anyway, you did, like the unions had earlier done, ask for the services of the Mediation Board? A. Oh, yes. The Mediation Board had accepted jurisdiction of the dispute growing out of the unions' notices, and on that basis I wanted the two disputes, our notice, their notice, handled concurrently if they were to be handled.

THE COURT: You served the notice and asked for the Mediation service.

THE WITNESS: That is right, your Honor.

THE COURT: Both of you were trying to get in the same position.

THE WITNESS: Yes, sir.

THE COURT: Both of you gambling on what a court might do.

THE WITNESS: Yes, that is all there was to it.

* * * * *

[171] BY MR. HALEY:

Q. Well, Mr. Wolfe, the National Railway Labor Conference, through its attorneys, and perhaps you, opposed the National Mediation Board handling the disputes arising from these notices, the unions' June and July notices, the railroads' December notices on a railroad by railroad basis. But you formally opposed the Mediation Board doing that, and the Mediation Board, the three members of the Board,

conducted a hearing at which the railroads were represented by, I believe, your son James and the Shea and Gardner firm? A. As I remember.

Q. In December? A. Yes. I know all about it. J. R. Wolfe and Chuck Hopkins, and I think we did have a member of the Shea firm there. I know—

Q. I think Mr. Shea was there. A. I know J. R. Wolfe and Charles Hopkins represented us.

Q. And the position the railroads were taking [172] in that was that the Mediation Board should not handle the disputes on a railroad by railroad basis but instead should handle them concurrently on a national basis. A. Just as they handled all other disputes for years and years.

Q. But that was your position, is that right? A. Yes. I am giving you my position.

* * * * *

[173] Q. And the Mediation Board denied or refused to handle it on a national basis and concluded to handle it on an individual railroad basis? A. Well, they never made a ruling to that effect, Mr. Haley. They simply went ahead and handled it on a local basis.

Q. It is my understanding that they had made a ruling. Now your son, Jim, was one of the lawyers that was representing the National Railway Labor Conference at that time at that hearing? A. That is correct.

Q. Perhaps he can give us the answer, if not, I think I have it.

But in any event whether they made a formal decision or not, they accepted jurisdiction [174] of the disputes on a railroad-by-railroad basis? A. They accepted it on three railroads to start with.

Q. Three railroads to start with? A. That is correct.

Q. That was the Missouri Pacific, the L&N and the Atlantic Coast Line, wasn't it? Or the Boston & Maine. A. The Boston & Maine, as I recall.

Q. There were four, then, weren't there? The Boston & Maine, the Missouri Pacific, the Southern and the Atlantic Coast Line?

* * * * *

Q. Then it ended up, though, with the Mediation Board accepting jurisdiction on really a notice-by-notice basis because some railroads had several [175] districts on them, isn't that right? A. I think they did that on the Union Pacific.

Q. In other words, they would accept it on a district-by-district basis and give the case a docket number like A-1234 for the unions, the dispute arising from the unions' notice, and the same number with a sub-1 for the dispute arising from the railroads' notice; is that right? A. I don't recall those details, but it could be.

Q. About this same time in January of 1966, just before the 25th of that month, did you instruct your attorneys, Messrs. Shea & Gardner in Washington to file what became known as the Akron, Barberton and Belt case? A. Yes, I did.

Q. The Chicago & North Western that is involved here was one of the railroads that was a party plaintiff in that case? A. I think that is correct.

Q. Along with the Atlantic Coast Line, the Boston & Maine, the Des Moines Union, the Missouri Pacific, the Southern, the UP and a hundred and some-odd others? A. No. As I recall there was a total of 80 railroads.

[176] Q. In the Akron, Barberton and Belt case, that was all of them that were subject to the Award of Board 282, was it not? A. No, the Eastern Railroad subject to the Luna agreement were not.

* * * * *

[178] Q. Did the National Railway Labor Conference direct or instruct the individual railroads it represented both in the Akron, Barberton and Belt case generally in the crew consist matter not to engage in further negotiations or mediation under the notices after the Akron, Barberton and Belt case was filed and until Judge Holsoff ruled in March with respect to the validity of the unions' June and July notices? A. That is correct, Mr. Haley. As I stated to you earlier, and which the Court made some comments, we had a reason for doing that. In addition, when the notice of the

employees was served in June, much of the procedures of Article III of the Award were being conducted, that is, special boards and negotiations to take off employees. And for those two reasons, primarily, our contention that the notice was premature we did instruct that there be no negotiations.

Q. And the North Western which is involved here followed your instructions and did not conduct any negotiations? A. To the best of my knowledge my instructions were complied with on all railroads.

[179] Q. So they were all in the same boat.

Now then, Judge Holsoff made an order in the Akron, Barberton & Belt case along in March, the end of March I believe it was, in which he ruled that the notices that were served by the union in June and July of 1965 and by the railroads in December of 1965 became valid notices with the expiration of the Award of Board 282 on January 25, 1966; is that right? A. That is correct.

* * * * *

[180] Q. Then, of course, then you did instruct the railroads, including the North Western that they should then or could then have what you described as the initial conference with the railroads—with the general chairman upon whom they had served the notice and from whom they had received the Section 6 notice? A. Yes, following what the Railway Labor Act requires they hold their initial conference.

Q. That in that conference they should refuse [181] to negotiate with the individual general chairmen except on a national basis? A. We urged the individual railroads to insist upon national handling.

Q. In other words, either national handling or no negotiations on an individual railroad? A. I don't think we went that far. We thought the case should be handled on a national basis and we so informed the railroads.

Q. So as a result of that the general chairmen, each of the chairmen who had served the notice, insisted on handling the notices on the individual property. The railroad

insisted on negotiations, if any, to be on a national basis, as a result of that there were none? A. Well, the "if any" applies both to local handling and national handling.

Q. So as far as you know no negotiations on the merits? A. The union said you will either handle it locally or there will be no negotiations. We said you either handle it nationally or there will be no negotiations at this time.

Q. And the result of it was there were no negotiations? A. I think that is correct.

[182] Q. Then the Mediation Boad, though, in the meantime commenced active mediation on certain of the railroads? A. That is right.

Q. And those certain of the railroads were the ones that you mentioned awhile ago, the Boston and Maine, the Atlantic Coastline, the Missouri Pacific, the Southern,—not the Southern— A. Des Moines Union.

Q. Pardon? A. Des Moines Union.

Q. The Des Moines Union, The C&O, the L&N,— A. Well, they all came in later.

Q. Right. But then is when you and Mr. Luna had the meeting in August of 1966, was it? A. August 30th, 1966.

Q. And got into what we called in the Atlantic Coastline Case the super mediation that was to go on, is that what we called it? A. Special mediation.

Q. Special mediation. In other words, you designated a member of the National Railway Labor Conference, the Mediation Board provided a mediator, Mr. Luna designated a vice president or a deputy [183] president of the union— A. A grand lodge officer, yes, sir.

Q. —to work with the general chairman representing the Brotherhood of Railroad Trainmen on each of those four railroads? A. That is right.

Q. And crew consist was negotiated then, wasn't it? A. It was discussed.

* * * * *

[184] * * * [C]rew consist got a thorough airing again in that super mediation on those particular railroads, didn't it? A. No.

Q. It didn't? A. No. It was the same thing we have had since 1959. The unions say 1 and 2 or else.

Q. It got enough of a negotiation that Judge Holsoff found the negotiations on the Boston and Maine, Atlantic Coastline, Des Moines Union had been conducted in good faith, didn't it? A. I don't recall.

* * * * *

[185] Q. But there were no further negotiations that you know of on the merits after this super mediation that we spoke of in August of 1966 on those few railroads? A. Not that I recall.

Q. You were getting reports from the individual railroads you represented when anything occurred on it, you as chairman of the National Railway Labor Conference? A. That is correct.

Q. So nothing more occurred until after certiorari was denied by the Supeme Court in the Atlantic Coast Line and Akron, Barberton and Belt cases in January, 1968? A. Well, yes, after the so-called special mediation I attempted to meet with Mr. Luna as we had agreed to and he refused to see me.

Q. Well, I am talking about negotiations on individual railroads between a general chairman and a personnel officer of that railroad. A. Well now that you have made yourself clear, I think you are correct.

Q. Then in January of 1968 you were still chairman of the National Railway Labor Conference? A. What date?

Q. January 1968. A. No, I was not.

Q. You had retired, that is, for the record, in June or July of '67? A. August 1, '67.

* * * * *

Q. You were succeeded, then, by Mr. Hiltz, is that right? A. That is right.

* * * * *

[189] Q. Now did you, Mr. Wolfe,—and of course, during the time this litigation was going on or even before that, I believe you testified about the making of the Luna-Saunders agreement and the Luna-Touhy agreement as they have become known? A. Yes, I know about the so-called Luna

agreement. Someone added Saunders along to it. I still refer to it as the Luna agreement, and it is so referred to in my affidavit. I think it is the same agreement.

Q. Now that agreement was made January 29th, 1965, that was six months before the union served its June and July 1965 notices and almost a year before the expiration of the award of Board 282? A. That is correct.

[190] Q. That agreement—there was some question about it yesterday, it has now been put into evidence—as I count it that agreement covered some 33 eastern railroads, did it not? A. Well, Mr. Haley, it was the Pennsylvania, the New York Central, the Erie Lackawanna, the Chesapeake and Ohio, I recall, and most of those—

Q. The Baltimore and Ohio. A. Or the Baltimore-Ohio, one of the two—and most of the others were subsidiary lines of those larger railroads. Little railroads.

* * * * *

[197] Q. Following the denial of certiorari in the Akron, Barberton and Belt Line and the Atlantic Coastline cases in January of 1963, were you sufficiently in contact with the situation to know that the only strike which was authorized by the union was against the Missouri Pacific and Texas Pacific? A. The first one?

Q. The first one. The Missouri Pacific and the Texas Pacific. A. Was in the Atlantic Coastline?

Q. Now the Atlantic Coastline strike, as I understand it, the Atlantic Coastline promulgated and the union struck in retaliation, but the union did not initiate. The only exercise of self-help initiated by the union first was against the Missouri Pacific and the Texas and Pacific, and then as a defense against the Atlantic Coastline's promulgations? A. You asked me if I was sufficiently familiar to answer your question as to whether the Missouri Pacific, the Texas and Pacific were struck. I know they were struck.

Q. Right.

* * * * *

[200] Q. On the day the L&N was struck first, which was the 8th of November, a year ago, the President appointed Emergency Board 172? A. That is right.

Q. We all participated in that, you, me, Mr. Beers, Mr. Dempsey, Mr. Shea, and we went through—we gave crew consist another good airing there on the L&N, IC and Belt, didn't we? A. Yes, we had an emergency board hearing.

Q. If fully developed the position of the [201] railroads and of the union, didn't it? A. Well, you said it did.

Q. Do you disagree with that? A. No, I can't say I disagree.

Q. Would you say there is any significant difference between the IC, L&N and the North Western? A. Oh, yes, there is a great difference.

Q. A great difference. A. As the record will show.

Q. Right. O.K.

In other words—now then, after the Emergency Board there was one more strike called against the L&N. A. And then the Illinois Central.

Q. Then the Illinois Central. And, of course, we both participated in the litigation growing out of the L&N strike. A. Yes, we did.

Q. That was the one we have been talking about as the Nasvhille case. A. I beg your pardon?

Q. That was the Nashville case? A. Nashville, yes.

* * * * *

[202] Q. Can you tell us the provisions of the various agreements that have been made—first, how many agreements and second, what they provided?

THE COURT: Could you just give us an estimate as to whether it was one or two or twenty, just an estimate, your best estimate based on your knowledge.

[203] THE WITNESS: It will be a guess, your Honor, because I am really not—

THE COURT: Well, it will be an educated guess.

THE WITNESS: Well, I will say maybe as many as a hundred or 120 agreements. But Mr. Haley's question was two-fold, as I understood it.

BY MR. HALEY:

Q. There were two questions. I tried to separate them. How many and do you know what they provide? A. Well, I know about many of their agreements, not all, of course. I would view all of the agreements together as almost the same as a national agreement, 1 and 2.

* * * * *

[212] Q. So there had been the matter of crew consist, I believe you testified, I think it had been included in notices or as one item among several items that had been included or previously included in notices that went to national handling. A. That is right.

Q. But the crew consist issue had been dropped from every one of the notices in which it had been included as one of the items when those notices were [213] resolved nationally. A. That is right. In all of those cases a great many issues were dropped because they just didn't have the time to do like the presidential railroad commission did.

Q. For whatever the reason was, though, they were dropped and never became a matter of national agreement? A. That is right.

* * * * *

[213] REDIRECT EXAMINATION

BY MR. SCHMIEGE:

Q. Mr. Wolfe, Mr. Haley referred to certain negotiations and mediation that took place after the Presidential Commission made its recommendation and before Public Law 88-108 was enacted, and he referred to certain discussions that took place over crew consist during those negotiations and [214] mediation sessions. Were those discussions on crew consist or were they on procedure? A. Entirely procedure. We never at any time discussed how many men should be on any particular run.

* * * * *

Q. Mr. Haley also referred to the fact that during the Presidential Railroad Commission you participated in certain negotiations on crew consist. During those negotiations or discussions, did you refer to the Chicago and North

Western at all? A. Oh, no, we didn't refer to any railroad.

Q. During the negotiations or discussions between the PRC and Emergency Boad No. 154, was the matter of crew size on the North Western discussed [215] at all? A. It was not.

Q. During the negotiations or mediation that was conducted by Emergency Board No. 154, was the matter of crew size on the North Western discussed? A. It was not.

Q. During the hearings before Arbitration Board No. 154 and during the executive sessions of that board, was the matter of crew size on the Chicago North Western discussed? A. Certainly there was no discussion of crew size on the North Western in executive session, and I do not recall whether we introduced any exhibits before the Arbitration Board in connection with operations on the North Western.

* * * * *

[217] JAMES R. WOLFE

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHMIEGE:

Q. State your name and address for the record, please. A. My name is James R. Wolfe. My address, business address, is 400 West Madison Street, Chicago, Illinois.

Q. By whom are you employed? A. I am employed by the Chicago & North Western Railway Company.

Q. What is your position with the Chicago & North Western? A. I am Vice President, Labor Relations of the [218] railroad.

Q. Will you tell us, please, what your duties are and your responsibilities as Vice President of Labor Relations? A. Yes. As Vice President, Labor Relations, I am in charge, I am responsible for collective bargaining with all of the labor organizations that hold contracts on our railroad. I also am responsible for the North Western's participation

in national bargaining affairs. I am also responsible for the collection and assemblage of data and agreements which are made by other railroads in the industry.

Q. When did you become Vice President of Labor Relations for the North Western? A. I was elected Vice President, Labor Relations, the first week of April, 1968. However, because of other duties that I had at my prior position, I did not officially join the North Western until June 1, 1968. However, between April, the first week of April and June, I did participate in certain collective bargaining matters, including certain discussions on crew consist.

Q. And what was your prior experience in the railroad industry? By that, I mean your experience [219] prior to coming to the North Western. A. Yes. After graduating from law school in 1953, I joined the Burlington Railroad in their law department as an attorney in the litigation section. I tried personal injury matters, loss and damage matters, and whatever liaison was necessary between the law department and the labor relations department, with a few years off for Army duty.

In 1959 I resigned from the Burlington and was appointed a member of the National Railroad Adjustment Boad, and I was the Southeastern Carriers' member of that Board. I wore two hats at that time. I was also the Southeastern Railroads' counsel in national labor cases, and in that capacity I appeared before your Honor once or twice.

In 1964 I was appointed general attorney of the National Railway Labor Conference, the national bargaining arm of the railroads, and subsequent to that was made general counsel of the National Railway Labor Conference, the position I held just before coming to North Western.

* * * * *

[220] The North Western is really a collection of railroads that were merged into it, and when these separate properties were merged into the North Western, the employees retained their individual labor contracts. So that on the prior districts we have separate general chairmen with separate agreements.

* * * * *

[226] Q. Mr. Wolfe, did the Chicago and North Western and the Brotherhood of Railroad Trainmen exchange Section 6 notices on crew consist in 1965? A. Yes, they did. In July of 1965 the North Western along with virtually all of the Class I railroads was served with notices which were virtually identical with the notices that the organizations [227] served during the 1959 notice-serving period, and the railroad subsequently served counter notices to that notice which were virtually identical with the November 2nd, 1959, notices that the railroads had served.

* * * * *

[230] Q. Was the Chicago and North Western one of the railroads that took the position that the unions' notice was premature and that there was no duty to bargain during the term of the award? A. Yes, it was. Of course, that position was based on the fact that the award was still in existence and we could still operate under the procedures of the award. But we took the position the same as the other railroads did under the direction [231] of the NLRC.

Q. Was there in fact any meetings on that notice in 1966? * * * A. The initial conference was held in January of 1966.

Q. On what day in January? A. January 18th.

Q. So that was prior to the expiration of the award? A. That is right.

* * * * *

Q. Was there a subsequent meeting in 1966 on those notices? A. Yes, there was. I think, and the previous witness has testified, this matter was handled in court before the United States District Court for the District of Columbia. In the spring of 1966, I think in March, that Court entered a preliminary [232] order holding that the notices were premature and that any meetings held prior to the expiration of the award were ineffective. So the railroads, including the North Western, when that order was issued immediately wrote the unions suggesting that we come in and meet, sit down and discuss both their notices and ours.

Now that letter was sent out in March. The unions refused to come in and meet.

* * * * *

The unions said it was a preliminary order and it wasn't final; that the matter—in addition, the matter was in mediation and they refused the railroads' offer of negotiations.

THE COURT: What was the date of the expiration under the award?

THE WITNESS: January 25th, as I recall, 1966.

THE COURT: 1966?

THE WITNESS: Yes, sir.

[233] BY MR. SCHMIEGE:

Q. Well, after the unions took this position, did the Court render a final order? A. Yes. In May—and the reason I remember these dates is because I was acting as one of the counsel in that case at that time—on May 31st of 1966 the United States District Court did enter a final order holding the notices premature and meetings ineffective, whereupon the railroads again, including the North Western, wrote the unions and said O.K., the order is now final, please let's come to the bargaining table and meet.

Q. Did we suggest a date for a meeting in that letter? A. Yes, that meeting was in June of 1966.

* * * * *

Q. Did that meeting in fact occur? A. It did in fact occur.

Q. What happened? A. At that meeting the union objected and would not agree to handling the matter nationally, objected and would not agree to handling the railroads' demand [234] concurrently with the unions' demand and insisted upon a restoration of a 1 and 2 crew.

Q. Were there any subsequent meetings in 1966? A. There was a subsequent meeting in August at which time the union simply repeated the position that they took in June.

Q. Were there any conferences in 1967? A. No, there were not. The National Mediation Board at that time had

jurisdiction of the case and in compliance with its long-standing procedure—The Atlantic Coastline litigation, your Honor, was pending at that time, and the Mediation Board simply held the matter in abeyance.

Q. Did the Chicago and North Western make any moves in 1968 to reopen negotiations on this dispute? A. Yes, shortly after the Jacksonville settlement, which was made in February of 1968, several of the railroads that still had to dispose of the crew consist issue and these notices met among themselves, and in order to discuss the [235] various alternatives that were available to them in an attempt to dispose of the issue. And at that time one possible solution to the problems that the representatives discussed was offering the employees themselves additional compensation in return for their increased productivity in working 1 and 1 jobs. The railroads at that time agreed—these several railroads that met—to transmit that offer or that possible approach to the representatives of the employees.

Q. Was there any precedent for that approach? A. Yes, there was. The railroads nationally had made such an agreement with the Brotherhood of Locomotive Engineers which returned to each engineer and addtional $4.00 per day on those jobs where he worked without a locomotive fireman. This was followed—this followed that same precedent and the idea was identical, virtually.

Q. After this meeting between these railroads what particular action did the North Western take? A. Well, the North Western addressed a letter to its collective bargaining representatives, the general chairman, making an offer of the payment of $3.45 a day to the train service employees who worked on crews manned with only one brakeman or one helper.

[236] Q. Could you convert that $3.45 a day into annual earnings? A. Yes. In rounded figures it would amount to about $1,000 a year to each man.

Q. This offer that was made, as you stated, to the general chairman, was there any advice of that offer given to the individual employees? A. Yes. Because this was an

issue involving jobs against additional compensation to the individual employees the representatives of the railroads decided to advise the employees themselves of the offer and copies of the letter were sent to all train and yard service employees.

Q. Would you tell the Court, please, how the union replied to that offer? A. The general chairman on the North Western replied in writing summarily rejecting the offer, and in the letter stated that it was not within their authority to bargain on matters on that kind of a proposal.

Q. I now show you what has been marked for identification as Plaintiff's Exhibit No. 13, would you identify that document, please? [237] A. Yes, this is a written memorandum on Brotherhood of Railroad Trainmen stationery dated March 14, 1968 signed by Gerald R. Maloney, General Chairman, who was and is General Chairman of the former Brotherhood of Railroad Trainmen, now United Transportation Union Trainmen on the North Western Proper. This is the written rejection of the North Western's offer of an additional $3.45 a day compensation to each employee working on a 1 and 1 crew.

MR. SCHMIEGE: Plaintiff's No. 13 for identification is offered into evidence, your Honor.

* * * * *

[238] THE COURT: It may be admitted.

(Whereupon said document heretofore marked as Plaintiff's Exhibit No. 13 for identification, was received in evidence.)

BY MR. SCHMIEGE:

Q. After the North Western received this reply from Mr. Maloney what action did it take regarding this offer? A. the North Western dropped the matter at [239] that time because of the rejection by the employees. However, subsequently—in fact, in our mediation conferences, which took place in May, June and July of 1969, I simply repeated the offer once more and it again was summarily rejected.

Q. When you became Vice President of Labor Relations for the North Western in 1968 were you able to reopen talks on crew consist? A. Yes, talks were reopened. They were reopened in this way: Mr. Heineman who is Chairman of the Board of North Western and Mr. Provo who is the President of the North Western met Mr. Luna on March 19, 1968 at a luncheon meeting for the purpose of discussing the crew consist issue. At that time Mr. Luna took the position that the North Western was in effect losing money on 1 and 1 crews because they were inefficient for working long hours, et cetera. Mr. Heineman and Mr. Provo said well, we will make a study to see if that proves to be the case. And Mr. Luna said that he had data and they would supply that data to the railroads subsequently after the railroad study was made. This meeting produced an arrangement to meet—for me to meet with the [240] North Western general chairmen during the months of May, June, July and August of 1968 on the crew consist subject and what we tèrmed a bona fide and honest attempt to sit down and try and settle the subject of crew consist.

Q. When was the first of those meetings actually held? A. The first such meeting was on May 16, 1968.

[241] Q. What was accomplished at that meeting? A. At that meeting we primarily accomplished three things: No. 1, we handed the general chairman the results of the studies that Mr. Heineman and Mr. Provo had agreed with Mr. Luna that they would perform. We described exhibits in the study which was in a bound book, to the general chairman explaining to him that the exhibit material confirmed and corroborated the railroads' position that the 1 and 1 crews during the past three years in actual operation had been extremely efficient and contributed to North Western's productivity.

Secondly, we proceeded to identify certain of the jobs that were working 1 and 1. Now this identification followed an understanding between Mr. Maloney and I as to the procedure we would follow in the talks that were to come along subsequently. We agreed—Mr. Maloney said

that he would prefer to discuss first the yard jobs on the North Western District proper and then follow that with a discussion of the road jobs.

Q. That would be on just one of the railroads' five or six districts? A. That is on one of our districts. When I [242] say the C&NW district I mean the district which was originally the North Western before we started adding to it with these other railroads.

However, in discussing the yard jobs Mr. Maloney stated to me that there was no sense in even identifying or discussing the yard jobs in the Chicago terminal area which we yet operated 1 and 1 for the past three years because they must be returned 1 and 2 without question or discussion.

Q. How many yard jobs are there in Mr. Maloney's district, approximately? A. Well, we have hundreds, but insofar as those we were authorized to operate 1 and 1 there were approximately 60.

Q. What percentage of that or proportion of that would be in the Chicago terminal? A. Well, I misspoke. We have 60 outside of Chicago and over 20—between 20 and 30 in the Chicago terminal area.

Q. So approximately one-third of the jobs in Mr. Maloney's district are in the Chicago terminal? A. That is right.

Q. When were the next conferences held on crew consist? [243] A. The next informal meetings that Mr. Maloney and I held were in the month of June, 1968, June 12th and June 20th.

Q. What was Mr. Maloney's position on the yard jobs in his district at those meetings? A. On those two dates Mr. Maloney, without any sizable interruption from me, proceeded to identify each of his jobs and tell us what he was willing to do as to each of them. When he concluded on the 20th of his 80 some-odd jobs he agreed that 76, approximately, we would have to restore—add the second man, and he would permit us to continue to operate four with a short 1 and 1 crew.

Q. Did he make any mention at those meetings of the jobs in the Chicago terminal? A. He persisted in continu-

ing to emphasize that there was no sense in discussing them or mentioning them because they must without discussion be returned to 1 and 2.

Q. What type of explanation did he give for his demand that these jobs must be returned to 1 and 2? A. None.

Q. What was your reply to this demand? [244] A. My reply was that we had successfully operated the jobs with one helper over the course of the last three years, the study that we had conducted illustrated that they were extremely productive and efficient, and I would like some reason as to why we should put the second demand back on.

Q. To make it clear for the Court, at what meetings did you present this reply; was that at these first two meetings? A. Well, at the first two meetings, as I said—and this was in accordance with the procedure we had agreed to—Mr. Maloney mentioned his jobs and said what he was willing to do. The meetings that followed on the 17th of July and the 6th of August, I went over the same jobs in some detail and answered Mr. Maloney in the course of the following two meetings.

Now I might add, on the meeting of June 20th, Mr. Maloney was accompanied by four of his local chairmen who proceeded to corroborate Mr. Maloney's view that these jobs all had to be returned to 1 and 2.

Q. In these discussions was there any reference to the guidelines of Arbitration Board 282? [245] A. Not by Mr. Maloney. In fact, he insisted that we not refer to 282 or use the guidelines. In my description of the jobs, their characteristics, the conditions that each job was confronted with, the climatic conditions, et cetera, I used and mentioned the guidelines quite often. Of course, I had a study conducted by our operating department which gave me factual data on the number of cars handled by each job, the overtime worked by each job, the technological improvements that had been installed since the jobs were operated 1 and 1, the climatic conditions at the area where the job was operated, the nature of the assignment, whether in yard

service, for example whether it was an industry job, a lead switching job, a hump job, a trimmer job, et cetera; all of this I gave to Mr. Maloney to illustrate to him our position.

[246] Q. At the conclusion of these four meetings in 1968 that you had with Mr. Maloney, how many of the jobs in his district had you discussed? And by that I mean both road and yard jobs. A. We discussed no road jobs at all. We discussed his yard jobs outside of the Chicago district.

Q. You have mentioned that at the July 17th meeting Mr. Maloney appeared with four of his general chairmen. Who was present at the August 6th meeting? A. At the August meeting Mr. Maloney was accompanied by a grand lodge officer, Mr. Francis Tuffley, International Vice President of the Brotherhood of Railroad Trainmen who is now Vice President of the United Transportation Union, Trainmen Division.

Q. What did Mr. Maloney have to say at that meeting? A. Mr. Maloney?

Q. Pardon me. What did Mr. Tuffley have to say at that meeting? A. Mr. Tuffley sat with Mr. Maloney, and I did not object to this, although, it was not strictly in conformity with our original understanding that [247] this would be a local North Western affair, and he gave me no notice that Mr. Tuffley was coming. However, I did not object. I know Mr. Tuffley. I have dealt with him before. In any event, Mr. Tuffley simply sat with Mr. Maloney and would make a general comment now and then. However, when I concluded my discussion and told them what we were willing to do insofar as these assignments were concerned, Mr. Tuffley pulled some papers out of his briefcase. He said words to this effect that the North Western is going to have to come along as these have. And I asked him what those were and he indicated that those were agreements made by other railroads.

Q. Did Mr. Maloney make any comment? A. Yes, Mr. Maloney said the North Western is no different than the others, or words to that effect.

Q. What was your answer to that? A. Well, my answer was that we were here, I thought, to negotiate on conditions that existed on the North Western, local conditions, in conformity with Mr. Luna's testimony before the Atlantic Coast Line that this was a local case and not a national case and it was to be determined on the conditions [248] on each railroad.

I also indicated that I had provided the employees with a large amount of factual data on each assignment.

Q. Did Mr. Tuffley make any reply to that? A. As I recall, Mr. Tuffley put his papers back in his briefcase and indicated that he thought it was time to call in the National Mediation Board into this matter.

Q. What was your statement then? A. My statement was I thought this was premature because we had not even discussed all of Mr. Maloney's yard jobs. We had not discussed any of Mr. Maloney's 1 and 1 road jobs. We had not discussed the carriers' proposal in any way shape or form. And I had not even had a meeting with any of the other general chairmen on any of the North Western districts.

Mr. Tuffley and Mr. Maloney amicably shook hands with me and left the meeting.

Q. Did you subsequently hear from Mr. Maloney? A. I did.

Q. When was that? A. The next morning. Mr. Maloney called me on the phone and said they had considered the matter [249] and thought that we probably should discuss our 1 and 1 road jobs and he would be in touch with me in the next several weeks to set a date to discuss them.

[249] * * * * *

DIRECT EXAMINATION
(Resumed)

BY MR. SCHMIEGE:

[251] Q. Mr. Wolfe, I show you what has been marked as Plaintiff's Exhibit No. 14 for identification; would you identify that document, please. [252] A. Well, this is a

letter, a joint letter addressed to Messrs. Walter Callies and Gerald Maloney which is an offer to pay an allowance of $3.45 a day to the train and yard crew members of 1 and 1 crews. It is dated March 8th, 1968.

Q. I now show you what has been marked for identification as Plaintiff's Exhibit No. 15; could you identify that document, please. A. Yes, this is addressed to all conductors and trainmen on the Chicago and North Western. It is simply communicating to the individual employees the fact of the offer of the 8th.

MR. SCHMIEGE: Your Honor, plaintiff's Exhibits for identification 14 and 15 are offered in evidence. These are the two documents that Mr. Haley referred to yesterday as being background to Plaintiff's Exhibit No. 13.

THE COURT: Admitted. * * *

* * * * *

[254] Q. Mr. Wolfe, when we broke off yesterday you had just testified as to a conference on August 6, 1968 and the fact that when that conference ended Mr. Maloney told you that he would call you the next day, and the next day in fact he did call you and promised to call you at some time in the future to reschedule conferences.

Did Mr. Maloney in fact call you at any time in the future to schedule another conference? A. Well, he said on the 6th—or the 7th, I should say—that he would call me within the next several weeks to schedule a conference. He did not. The next meeting, in fact, on crew consist on the North Western did not take place until April 22, 1969. I think I can explain why. In the first place there was a Belt strike in Chicago on the same subject during that period.

Secondly, we were—that is, I was actively negotiating with all of the operating crafts, a work coordination agreement involving the North Western and Great Western merger.

THE WITNESS: You see, your Honor, on [255] July 1, 1968 the Chicago and Great Western Railroad was

merged into the Chicago and North Western. It was extremely important to our employees, as well as to the railroad that we negotiate an agreement involving the protection of affected employees as well as the coordination of work. I handled those negotiations with a few of my assistants and four vice-presidents of the operating unions and all of our general chairmen, and that occupied our time until an agreement was reached on December 19. Now when we finally made an agreement on merger an Emergency Board which had been appointed by the President to investigate into the crew consist dispute on the Illinois Central, the L&N and the Belt was still in progress of conducting its procedures. We decided that we would wait until those procedures had been accomplished.

The day after the Illinois Central made its agreement on crew consist, the Jacksonville type agreement, Mr. Maloney came into my office and we discussed beginning conferences and we settled on the date of April 22nd about a week later as our first conference date.

[256] Q. And was a conference in fact then held on April 22nd? A. Yes, it was.

Q. And who was present at that conference? A. At that conference the Brotherhood of Railroad Trainmen was represented—of course, by this time it was no longer the Brotherhood of Railroad Trainmen because there had been a merger of the four operating unions into what is now called the United Transportation Union. But this was a meeting involving what had formerly been the Brotherhood of Railroad Trainmen, the United Transportation Union Trainmen Division.

The Union was represented by Mr. Maloney, the North Western District General Chairman, and he was accompanied by Walter Callies, the United Transportation Union conductor general chairman.

Q. At that meeting, that is the April 22nd, 1969, meeting, did Mr. Maloney depart at all from the position he had taken in the last meeting you had with him in August of 1968 that the North Western had to conform to the

crew consist agreements that other railroads had made? A. No, he did not. If I may, I think I can explain what happened in that respect.

[257] That morning, the morning of the 22nd, Mr. Callies, our conductor general chairman, accompanied by Mr. Maloney, met several of the officers of our department on another subject which involved another independent Section 6 notice, your Honor. That conference involved a request by the conductors for a five-day week in suburban service in the Chicago area, and at the end of that conference Mr. Maloney stated to our representatives that he thought he might have an approach to the crew consist matter.

My people told him that they thought it best that he hold that until that afternoon when he was scheduled to meet with me on that subject. So when we met the afternoon of the 22nd, Mr. Maloney started out by saying that he wanted me to understand that the North Western would have to return all of its 1 and 1 crews to a 1 and 2 status; that we would have to conform to the agreements made on other railroads and we could not deviate from it.

He said, in his opinion, he could get by with an 80 per cent return of 1 and 1 crews, and that would conform with what the other railroads had done. He said there is a possibility of doing something like this, he said, you have to put them all back to 1 and 2, and we have to make an agreement [258] to that effect, that after you put them back to 1 and 2, then perhaps you could buy back from me the 25 or 30 jobs in the Chicago terminal area to a 1 and 1 status in return for a five-day suburban week, five-day week in suburban service. He said, however, that he would have to get the approval of the Grand Lodge, namely, he would have to ask Mr. Tuffley, the BRT vice president if he would approve this proposition.

Q. You mentioned that Mr. Maloney said to you that you would have to return 80 per cent of the jobs which he described as being what was provided for in these other agreements. How many jobs would that have meant on the

North Western? A. Well, we were operating approximately 180 jobs with one brakeman or one helper, so that would have meant that we would have retained 36 jobs, 1 and 1, under that proposition, and I think as we proceed that is an important figure to keep in mind because it will enter into my testimony later.

[259] Q. Well, as of this meeting on April 22nd, when Mr. Maloney introduced the idea of suburban service, had the work load or safety of the crews in the Chicago terminal ever been discussed? A. Not at all. In fact, as I testified yesterday, Mr. Maloney had emphasized in our discussions in the spring and summer of the preceding year that we couldn't even discuss the Chicago terminal jobs, they had to be returned to 1 and 2, and of course here he was saying I will let you buy them back to a 1 and 1 status after we put them back 1 and 2 in return for a five-day week. So I was a little bit surprised.

Q. At this April 22nd meeting, was the subject of the carriers' proposal on main line service mentioned at all? A. Yes, it was. After Mr. Maloney mentioned the matter of suburban service, I asked him how would we settle in his opinion our proposal involving main line road service. He answered that there is a trend around the country to 1 and 2, and in all of those other understandings they have set aside in their handling the carriers' proposal, and it will have to be set aside on the Chicago and North Western, and [260] he stated he was not willing to discuss or talk about it.

Q. When was your next meeting with the union? A. Well, at that point we decided to meet again on April 30, and we did meet on April 30.

Q. And who was present at that meeting? A. Your Honor, I have my conference notes here, if I may refresh my recollection as to who attended those meetings, it would be helpful.

THE COURT: You may do so.

BY MR. SCHMIEGE:

Q. Please do. A. On April 30th, the union was represented by Mr. Maloney, the General Chairman on the North Western district; again Mr. Callies, our Conductor General Chairman on the North Western District; and Mr. Burke, Mr. Buster Burke, Vice Chairman of the BRT, North Western District from Boone, Iowa.

The North Western was represented by myself, Mr. Beisel, our Director of Labor Relations operating, and Mr. Humphrey, our Assistant Manager of Labor Relations operating.

Q. At this meeting on April 30th, had Mr. Maloney changed his position at all? [261] A. No, he did not. Of course, in between the previous meeting and this April 30th meeting, we had given considerable thought to this matter of suburban service, and I started the meeting out by telling Mr. Maloney that I thought we should bring in the other general chairmen, that up to this point, you see, none of the other general chairmen of the other districts had even discussed the crew consist matter with us. I told him that I thought that we should bring them in.

At this point Mr. Maloney became a little bit upset, and said I will be very candid with you, the Grand Lodge decided that the Illinois Central and the North Western would be last. It was also decided that the Illinois Central would be before the North Western. Now the Illinois Central has concluded its negotiations, and he said the Grand Lodge is pressing me to get moving, get going, and he said, we shouldn't have any difficulty here because we have got all of these other agreements to base what we do on.

At that point Maloney asked out of hand if I rejected his suburban service approach and I said, oh, no, I wasn't going to reject his approach, but [262] I thought we should bring the other general chairmen in.

At that point Mr. Maloney stated, I don't think we will have any difficulty handling the crew consist matter separately because of what is in this file, and he lifted up a file,

and I said what is in the file? He said it contains all the crew consist agreements made across the country, and these agreements have established a percentage pattern, and that pattern will have to be followed here. He said, you don't think I would agree to any lower percentage here on the North Western, do you?

At that point I said, well, Mr. Maloney, I think in conformity with what Mr. Luna, your president, has said before the District Court of Appeals and many other places, we ought to handle this matter on a local North Western basis based on conditions which confront the North Western, and I think that you had better get the other general chairmen in. He at that time agreed that he would get in touch with the other general chairmen, and hopefully they would be present for our next meeting.

Q. Did you schedule a date for another meeting at that time? [263] A. Yes, a meeting was set for May 9th.

Q. And that meeting in fact occurred? A. Yes, it did.

Q. Now who was present? A. At that meeting on May 9th the organization was represented by Mr. Maloney, Chairman of the North Western District Proper; Mr. Cardinal, General Chairman of the former Omaha District, Mr. Stanley, General Chairman of the former M&StL Road District; Mr. Rosenthal, General Chairman of the former Litchfield and Madison District. Only one of our general chairmen was missing, Mr. Stahley, General Chairman of the former C&TW District, who was ill at that time—at least, I was told that, and I assume that he was.

[264] Q. What happened at that meeting? A. At that meeting? A. At that meeting, since this was the first time that the other general chairmen had been in to discuss crew consist with us, I confirmed with them what had happened theretofore insofar as dates were concerned, and they confirmed those dates with me.

After I confirmed the dates, Mr. Maloney then made a statement to the other general chairmen more or less in explanation to them of why the matter had been delayed up to this point. He described our informal meetings, his

and mine, in the spring and summer of 1968 by saying that the Grand Lodge had decided the Illinois Central and North Western should not be struck at the same time. He stated that he saw Mr. Luna just two days before, and Mr. Luna in his words was chafing at the bit for them to get going on the North Western.

At that point, I stated that I thought it would be appropriate at this time to go into a description and evaluation and analysis of the jobs on these other districts. Mr. Maloney said job studies would not be necessary, there is plenty of precedent for a North Western agreement in settlements [265] made on the other roads.

At this time I then proceeded to make a brief summary to the chairmen of the conferences that Mr. Maloney and I had the preceding spring and summer. I stated to them that they were informal conferences, hopefully in a good faith effort to sit down and settle the matter on the North Western. However, nothing was accomplished because at the end, Mr. Tuffley and Mr. Maloney insisted that we follow what had been done on the other roads.

At that point I was interrupted by Mr. Cardinal, the General Chairman of the former Omaha District, who stated there was no sense in sparring around, agreements have been made by the other railroads, he would not agree to anything different, and the Chicago & North Western must do exactly what the Milwaukee and the Great Northern had done as well as the others.

I then suggested to Mr. Maloney that he might inform his chairmen about the suburban service approach that he had made at our prior meeting. Mr. Maloney then told the chairmen that this was a matter that involved only he and Mr. Callies, and that he and Mr. Callies, the Conductor General Chairman, [266] would have to take care of it.

At that point, I interrupted Mr. Maloney and said, well, you raised the suburban service question. Apparently you want me to buy jobs back after I restore people we don't need. What would you have in mind to trade for them?

He stated, in a somewhat agitated manner, that he withdrew his suburban service proposal, forget about that approach, and it was withdrawn from the crew consist issue.

At that time I again repeated to the general chairmen that I thought we ought to engage in job analysis and job studies on all of the districts because we hadn't done that, and that was the manner in which this case should be settled. Mr. Cardinal said that he and Mr. Stahley, who was ill, would be in about the 14th or 15th to discuss the matter again with me.

[267] Q. As of that meeting had there been any discussions on the North Western concerning road jobs? A. None whatever.

Q. What position did the union take regarding road jobs then? A. Well, on main line road jobs, as I said before, Mr. Maloney took the position that we would not even discuss it because it had been set aside on other handlings. Insofar as branch line road jobs that had been blanked under the Award and had been operated with one brakeman and one helper during the preceding three to four years–

Q. Pardon me, Mr. Wolfe, I think you misspoke. You meant one conductor. A. What did I say?

Q. You said one brakeman and one helper. A. One brakeman. Yes, we are in road service now. I am sorry. In road service it is a conductor and a brakeman and in yard service it is a foreman and a helper.

In the preceding three to four years we had been operating a number of branch line road jobs with a conductor and one brakeman.

[268] At the May 9th meeting Mr. Maloney said he would not agree to study any of the road jobs that had been blanked; they too must all be restored without comment.

Q. The meeting you just referred to is the May 9th meeting? A. That is right.

Q. Were there any further meetings prior to mediation? A. Yes. Before Mr. Cardinal, the Omaha General Chairman left, on May 9th, he agreed to meet with me to dis-

cuss the crew consist issue on his district. We met on the morning of May 15th.

Q. At that time what was Mr. Cardinal's position on this dispute? A. After I identified the jobs in Mr. Cardinal's district that were working with a short crew–

Q. What do you mean by "identifying jobs"? A. Simply telling him which ones they were that we were working with 1 and 1.

Mr. Cardinal stated, and I remember very well, he said that positively all jobs must be restored to 1 and 2. He said Elmer Dirks, who for the purpose of the record, is the UTU [269] General Chairman on the Milwaukee Railroad, has got all of his jobs back, the Great Northern has put them all back, and I positively must have them back.

I asked Mr. Cardinal at that point if he was saying that we had to put all of the jobs back 1 and 2 simply because the other railroads had done so. He answered by saying "No, I am not saying that." And then he paused for about three or four seconds and said, "Yes, I guess I am saying that." Whereupon I asked him if we would be wasting our time if we discussed each of these jobs and analyzed them. He answered, "I am going to be honest, the answer is yes, we would be wasting our time." The discussion continued on a couple of general subjects which didn't really involve the crew consist issue, and we concluded by–I again asked Mr. Cardinal if we could have another meeting; I thought we should assemble overtime data; I thought we should assemble cars handled data, and Mr. Cardinal replied, "No, the jobs must be restored 1 and 2."

[270] Q. As of that time had you had the opportunity to meet with anyone from the Chicago Great Western district to discuss crew consist? A. No, we had not.

As I said before, the Great Western merged into the North Western July 1, 1968. We had our first meeting on May 15 in the afternoon. We met with Mr. Cardinal in the morning, and we met with Mr. Stahley, the former Chicago Great Western District General Chairman, that afternoon.

Q. What position did Mr. Stahley take in this dispute? A. Well, first we again confirmed with Mr. Stahley the dates on which the notices had been served and the dates on which the crew consist agreement under Award 282 had been executed. After confirming those dates we attempted to identify his 1 and 1 jobs. At that point I asked Mr. Stahley if he wanted to discuss them individually in detail. Mr. Stahley said he would have to go along with the other general chairmen because of the common terminal problems, and because of what had been done. I asked Mr. Stahley if he was willing to analyze the performance of each job assignment by [271] assignment, and his answer was, "They all must be returned at 1 and 1 at the common terminals." He would be willing to give us a few jobs perhaps at some outlying points.

Now the common terminals, of course, on the Great Western are the Twin Cities, Kansas City, Marshalltown, Des Moines, Council Bluffs, and a great majority of the yard jobs, of course, that we were operating 1 and 1 on the Great Western District were at—are at those common terminals.

Q. Why did Mr. Stahley make this particular reference to common terminals? What is the importance of that? A. Well, because at the common terminals, of course, these crews operate in proximity with the crews of other railroads and with crews of other North Western districts.

That was about the extent of the meeting with Mr. Stahley. We did discuss a number of other subjects. But insofar as the thrust towards handling the crew consist issue at that time, that was about the gist of it.

Q. Would you tell the Court, please, when mediation began in this case? [272] A. Well, when we finished—in fact, during the May 15th—that day that we met both Mr. Cardinal and Mr. Stahley for the first time, we received a wire from the National Mediation Board announcing that a mediator was coming on the property. I think they first said he would be there in the latter part of May but because of prior commitments and the Decoration Day holiday he actually appeared on the scene on June 2nd, 1969.

Now the mediator that was assigned was Mr. Glover, a veteran mediator with the National Mediation Board, who at one time was president of the Switchmen's Union of North America, but he has been with the National Mediation Board for many years.

Q. Did you have occasion to meet with Mr. Glover then?
A. Yes, the first day Mr. Glover was on the property he met with me privately, and I am sure that he also met with the organizations which is the customary way of handling something like that. They meet with you first to find out just exactly where you are and what has happened before they plan what they are going to do.

[273] Mr. Glover met with me on the 2nd. I briefed him on the dispute. That briefing consisted in summary of this: I simply told him—I advised him of the Atlantic Coastline litigation, the fact that the organization argued to the Court and testified to the Court that this was a matter that should be handled locally and should not be handled nationally; it had to be handled on each individual railroad because of the curves and the hills and the climate and the differences; it is the characteristics on each railroad being different. And yet on the North Western they had done just the opposite. They had refused to discuss the curves, the hills, the climate and the terrain and they had insisted immovably that we make an agreement restoring all of these jobs to 1 and 2 without discussing the North Western situation simply because the other railroads had restored jobs to 1 and 2.

THE COURT: Now we are coming to the point where the irresistable force is striking an immovable object.

THE WITNESS: Yes, Judge.

May I proceed?

THE COURT: Go ahead.

[274] BY THE WITNESS:

A. (Continuing) I told Mr. Glover that in my opinion at this point it was absolutely essential that we do some local—try to get these people discussing things from the context of the North Western Railroad. I suggested that

we, the North Western, go ahead and do a job study of the performance of work by some of these individual jobs, 1 and 1 jobs, that we had worked four years 1 and 1 most successfully in order to try and move them, to get them to do what their president had testified should be done, and on his testimony in part, I suppose, the Court ruled that this thing should be handled locally.

Mr. Glover took my request under advisement and said he would meet me for lunch the next day. We met for lunch, at which time he asked me how long I had in mind for such a job study, and I said, "Well, I thought we should study every job." He said, That would not be possible, the organizations would not stand for it.

THE COURT: What is the date now?

THE WITNESS: That was June 3, 1969, your Honor. [275] * * * I suggested then that we possibly—that we try very hard to study 50 of the 180 jobs in a two week period and that we recess the conferences for us, in order for us to accomplish that study. He said, "Well, I will be in touch with you." He called me back later that afternoon, as I recall and said that he would like to bring the parties together the next day. And I said, "Fine." And we met in our conference room for the first mediation session on June 4, 1969.

Q. Who was present at that session? A. At that session the organization was represented by a Grand Lodge officer for the first time since Mr. Tuffley was with us that one day in August of 1968. This is customary. When you get into mediation normally the organization will assign a Grand Lodge officer to work with their general chairmen. The Grand Lodge officer assigned was Mr. Moore, I believe, Deputy President of the BRT, and he was accompanied by Mr. Maloney, General Chairman of the North Western District, Mr. Stanley [276] of the M&St.L, Mr. Stahley, Chicago Great Western and Mr. Cardinal of the Omaha. Again, I had Messrs. Beisel and Humphrey with me.

Q. Would you explain what position the North Western took on the matter of job studies at that session? A. The

meeting opened by Mr. Glover asking me to discuss and explain why I thought a two-week job study might be of assistance. I answered that it was an attempt by us to show the organization representatives in concrete practical form why they should quit insisting upon a 1 and 2 restoration based upon what had been done on other railroads. At that point Mr. Maloney, after a little general discussion, stated that he, in his opinion job studies would not help to reach an agreement. Mr. Moore added that we would be in the same position after the study as we are now, namely, they would still be insisting on 1 and 2 just as the other railroads had done.

At that point I asked them to tell me why in their terms, give me a concrete answer as to why we had to restore the jobs to 1 and 2. Mr. Maloney [277] answered, "All you have to do is look at the other railroads. One railroad had 600 jobs 1 and 1 and they are all back at 1 and 2. Another railroad had 450 jobs at 1 and 1 and all but eight are back at 1 and 2." He said, "No matter how many time and motion studies you make, no matter how much you study the jobs, the fact remains that there is a national pattern established on the other railroads putting these jobs back at over 90 per cent." I said, "We are not talking about the other railroads; we are talking about the North Western."

I then asked Mr. Maloney if these other railroads had returned the men because they needed them. And at that point Mr. Moore interrupted and said that Mr. Maloney did not have to answer that question, and he did not.

[278] Q. What action did Mediator Glover take regarding your request for a two-week recess? A. Well, this was during the morning of June 4. As we were getting close to the noon recess, I recall that Mr. Maloney stated that he was of the firm belief that time studies or no time studies the BRT would get an agreement like it wants, 1 and 2, by saying here is what the Milwaukee, the Q, the Great Northern and the others have done, and this is what the North Western is going to do.

At that point Mr. Moore—or around that point Mr. Moore made a suggestion that we recess for lunch, and we did.

When we came back after the luncheon recess Mr. Glover shortly thereafter stated that the conferences would be recessed until June 18th so that the carrier could make a two-week 50-job study. At that point as we were leaving, Mr. Moore, I recall very well, made another concluding statement saying that he presumed the study was for the benefit of the carrier and not in any way to be used by the organization since when we returned on the 18th he did not intend to change [279] his position one iota relative to insisting on 1 and 2. In other words, regardless of what our studies showed, his position would remain the same, 1 and 2. I told him that that was very interesting, at which point the meeting was adjourned.

Q. Were those job studies in fact made? A. Yes, sir, they were between June 18th and the 1st—I mean, between June 4th and June 18th the job studies were done. They were performed by us.

I might add that at the June 4th meeting at the time Mr. Glover announced he was going to give us a recess he indicated to me that I should the next day advise the union what jobs we were going to study so they could have representatives there if they wanted to and that when the studies were concluded we should give them the results. And that is the time when Mr. Moore made this statement about whatever the studies returned he would still come back on the 18th demanding 1 and 2.

* * * * *

[280] Q. Mr. Wolfe, could you tell the Court, please, what the results of those job studies were? A. Yes. We made the studies during a two-week period by supervisory officers actually riding with and observing the performance of work by 50—I think we really were only able to get 45. We intended to get 50 but because of time pressures we were only able to get 45. But they observed minute to minute performance by these crews. The studies on the whole confirmed our position that the crews were not over-

worked and were able to accomplish their jobs during their tours of duty without any trouble and with efficiency.

Now on the 18th when we met, on a Wednesday–

* * * * *

June 18th, again, the people there; we were represented by myself and Mr. Beisel [281] and Mr. Humphrey, and the organization was represented by Mr. Moore, Mr. Maloney, Mr. Cardinal and another general chairman who–this was the first time he had come in–Mr. Shannon, the M&StL district yardmen general chairman. Mr. Glover also had another mediator with him, an assistant mediator by the name of Willets. So the Mediation Board had two representatives.

When we started out that day Mr. Maloney went right back to the worth of our job study. He said, "I don't care what the study shows. We aren't going to change our opinion." But, he said, "I will say one thing, at least my reports indicated that you conducted the study honestly."

* * * * *

[282] Maloney then asked me if I believed railroads across the country used either the guidelines of 282 or job or work studies in agreeing to 1 and 1 crews. I said I really didn't know, but I did know that we were supposed to handle this matter locally and find out what was going on on the North Western. And again he said that regardless of what those studies showed, it had to be 1 and 2.

At that point Mr. Moore asked me if I would be agreeable to accepting the pattern. I remember very well I asked him what the pattern was. Mr. Moore said, "The pattern is return 98 per cent return to 1 and 2 crews." Mr. Maloney at that point, I remember, jumped up and he said, "On that note it is time to make an agreement." And handed out to the parties the organizations' first written proposal. We looked at the proposal and discussed it for a short time, after which I again brought up the necessity of analyzing and examining the jobs. Mr. Moore stated that

he didn't give a damn about our time and motion studies, [283] the jobs must be returned to 1 and 2.

* * * * *

[284] Q. Mr. Wolfe, I now show you what has been marked for identification as Plaintiff's Exhibit 16. Would you describe that document, please. A. Yes. This is a copy of the proposal that Mr. Maloney handed to us at the meeting of June 18th.

* * * * *

Q. Mr. Wolfe, did the union submit any other [285] proposals during mediation? A. Yes. Subsequent to that proposal and during some of the following meetings which lasted until July 2, your Honor, the union handed us two additional proposals, a total of three during the mediation sessions.

Q. I now show you what has been marked for identification as Plaintiff's Exhibit 17. Would you identify that document, please. A. Yes. This is an employee proposal, and it is the second proposal that they handed to us during the mediation period. If my memory serves me correctly, I believe this proposal was handed to us, or was given to me by the mediator on June 24th, and we discussed it on June 25th.

Q. This is Plaintiff's Exhibit No. 18 for identification. Would you identify that, please. A. This is the third employees' proposal.

MR. SCHMIEGE: Plaintiff's Exhibits 17 and 18 for identification are offered in evidence, your Honor.

THE COURT: They are admitted.

* * * * *

[286] Q. Mr. Wolfe, will you explain to the Court, please, in a summary fashion what those proposals had to do with? A. May I have them?

The first proposal which was handed to us by Mr. Maloney right after Mr. Moore's description of the national pattern as a 98 per cent return is in fact a proposal that would make all jobs in both road and yard service 1 and 2,

that is, staffed with two brakemen or two helpers. It would also restore a third brakeman on certain way freight jobs on our main lines.

On the North Western, your Honor, prior to Award 282, we have a rule in our agreement, Rule 49, which required us to use a third brakeman on certain local freight jobs, you know, that stopped along the way at towns and hit a lot of head end business, less than carload business, that sort of thing. This rule was, in fact, removed, eliminated by one of the awards under 282, which permitted us to do away with that rule and operate those main line way freights with two brakemen.

Now, in conformity with the union's position [287] that they had to wipe out 282, they also in this proposal wanted us to put back that Rule 49, put those third men back, so this was about 120 per cent, or something like that. But in any event, it was simply a carte blanche return to 1 and 2.

* * * * *

The second proposal was handed to me by a mediator, I believe, on June 24th, and the third proposal, I believe, was handed to me by the mediator on July 1st. * * *

* * * * *

The second proposal * * * [288] would have returned all jobs to 1 and 2, and would have added a brakeman on three jobs which we operated with only a conductor prior to the Award. It would also have returned the third brakeman to all of the way freight jobs, and it would have permitted us to continue to operate five of our 180, 1 and 1 jobs, with the single brakeman, five yard jobs.

[289] * * * * *

MR. HALEY: In other words, it was a concession to leave one on those?

THE WITNESS: On five of 180 jobs.

BY MR. SCHMIEGE:

Q. Five of 180 that are presently 1 and 1? A. Yes. We have authority to operate about 216, your Honor, and

we were only operating 180 of those because we had some protected men. You remember under the award we had to protect all of the people–

THE COURT: Those that were employed.

THE WITNESS: Right, your Honor. We had about 26, 36 jobs that we had to have [290] second men on to give them work.

THE COURT: And your position was that you had an offer of five?

THE WITNESS: Really five out of 216, yes.

Now the third proposal and the last proposal we received in mediation was almost identical with the second one. The only distinction, the only difference, meaningful difference, was that it added three branch line road jobs to the five yard jobs.

THE COURT: Eight?

THE WITNESS: Eight, yes, your Honor. Of the 216, this would have permitted us to operate eight with 1 and 1, or we would have had to restore the second man to 208 of the jobs that we were authorized to operate.

Q. During mediation, did the carrier have occasion to introduce any proposals?

* * * * *

[291] A. So far up to now, the only proposal that had been introduced was the one employee proposal on June 18, and when that meeting ended, the Mediator said to us, I want you to have a proposal at the next meeting. So on Friday, June 20th, we introduced our first proposal.

That meeting on June 20th was attended only by Mr. Moore. He was the only employee representative there. The other general chairmen, I [292] assume, or all of the general chairmen were involved in other matters.

The Mediation Board was represented by Mr. Glover and Mr. Willets. At that meeting I handed Mr. Moore our proposal and described it to him.

Q. Let me show you now what has been marked for identification as Plaintiff's Exhibit 19. Would you describe

that document, please. A. This is the first carrier proposal, handed to the parties, handed to the other side on June 20, 1969.

* * * * *

[294] THE WITNESS: There are six proposals, your Honor. Are they marked?

MR. SCHMIEGE: Yes. Your Honor, we have the six proposals. The first one is Plaintiff's Exhibit 19 for identification, which is our first proposal.

* * * * *

The second proposal is Exhibit for identification No. 20; the third for identification No. 21; No. 4 is Plaintiff's for identification No. 22; No. 5 [295] is Plaintiff's for identification 23; and No. 6 is Plaintiff's for identification No. 24.

Those are all offered in evidence, your Honor.

THE COURT: They are admitted.

* * * * *

[296] Q. Mr. Wolfe, would you at this time briefly summarize those six proposals and explain to the Court the different approaches that were taken in each of those proposals. A. Yes. These are the six carrier proposals, Judge.

The first one was based on the needs of the North Western as mirrored by the guidelines of Arbitration Board No. 282, the actual experience that the North Western had for four years in running 180 some odd jobs with one brakeman or helper, and the conditions characteristic of our railroad. It was strictly a proposal based on our needs and submitted to the organization as such.

This proposal would eliminate the second brakeman on many main line through freight jobs, on additional branch line and yard jobs, and would add a second brakeman to a few of the jobs that we were presently operating 1 and 1 because of changed conditions.

Carrier proposal No. 2 was strictly a compromise proposal. The second proposal was a compromise proposal.

What we did in this proposal [297] was eliminate the jobs, eliminate the second man in main line through freight service.

THE COURT: May I see the first one? Just let me look at it for a second.

THE WITNESS: Yes, your Honor.

THE COURT: The total was how many?

THE WITNESS: The total jobs there that would be operated 1 and 1, it is a figure that you can't arrive at because the criteria in main line through freight service was the number of pick-ups and set-outs the trains would make. So it would be a varying figure.

THE COURT: Varying from what to what?

THE WITNESS: I would say that probably would have permitted us to operate around 400, 350 to 400 jobs with one brakeman or helper.

* * * * *

The second proposal, your Honor, as I said, was strictly a compromise. We eliminated from it all of the additional yard and branch line and main line through freight jobs that were not subject to treatment under Award No. 282. This proposal would have pretty much left us right where we are now with changes [298] made for changed conditions.

For example, your Honor, I am going to get into this with our next proposal, on our railroad, for example, the Award was entered in 1964, and we have been applying it every since then. But since 1964, Chrysler built a big plant at Belvidere, Illinois on the North Western, and we serve that plant. When we considered, when the Referee considered the jobs in 1964, we only had one yard crew there. Now we have four around the clock, and we think that all of those crews should only have one helper. However, because we haven't examined into the subject only the one has one helper, and the other two have two. But that is just an example. Things do change on the railroad, and crew consist is one subject where you must have a procedure to meet those changes.

All of our proposals, the first two that I have discussed, had such a procedure; namely, a provision for local arbitration to look into and decide these matters if the parties couldn't agree on jobs where we had changed conditions.

The organization objected to that procedure in our discussions. They said that they would not [299] agree to any arbitration provision. So the carriers' proposal No. 3 is exactly like proposal 2 except we eliminated the local arbitration feature, and it contains no provision to take care of future changed conditions.

Carrier Proposal No. 4 was a completely new approach. As I go through these, your Honor, each one of them as we presented it was summarily rejected by the organization, so as we went from one to the other, it became necessary for us, we thought, to try to find new approaches to the subject in an attempt to settle the dispute.

Now Carrier Proposal No. 4 is based on submitting the whole crew consist issue to third party determination with the details to be worked out with Mediator Glover.

THE COURT: By arbitration?

THE WITNESS: Yes, your Honor. That was rejected.

Carrier Proposal No. 5 was another new approach. As the proposal says, adding an extra man to any assignments presently worked would reduce our productivity since our studies show that the second man was unnecessary by every [300] test. However, since it seemed to be absolutely essential to the organizations that we put the men back we said let's examine into the possibility of putting them back, but let's change some of our other rules so that we get paid for that decrease in productivity by putting the second man back. We said we are open to suggestions as to what rules we would change, but there were plenty we could, such as the interdivisional run. That approach was summarily rejected by the organization.

You see, Judge, our present rules generally limit us to runs of a hundred miles based on seniority districts. We can run crews on some trains much farther than that. We could if we had rule changes which would help us. We

would like to do that in many cases, and we thought, all right, we will put back some second men we don't need if you will help us increase our productivity by changing this other rule.

That was simply an example of what I had in mind. It was an approach, and the proposal was simply a written exposition of that approach, but that approach was rejected.

[301] Carrier Proposal No. 6 was our final attempt, and this too was a different approach. Here we agreed that in return for a one-year moratorium on crew consist changes we would grant the employees a five-day week in suburban service. In other words, in return for maintaining the status quo just as it was the day I made the proposal, we would give them the five-day week in suburban service. That was summarily rejected.

[302] Q. Mr. Wolfe, before we resume your testimony as to what happened in mediation, let me get it straight in my own mind exactly where we stand.

On June 18th of this year, the union presented its first proposal, and we have discussed that one in detail already. At that meeting Mediator Glover asked you to present a proposal, and you presented your first proposal at the meeting of June 20th of this year? A. That is right. That was a Friday.

Q. And you have just analyzed that proposal? A. I really didn't analyze it. I described it to Mr. Moore, who was not accompanied by any other general chairmen. He was by himself. Mr. Moore rejected the proposal out of hand. He said he would not accept it, and at that point the Mediator said conferences would be resumed next week, and he announced that he would not be with us the following week, most of that week, that is Mediator Glover, and that Mediator Willets would handle the conferences. He did not set a date for the next meeting. He simply said that Mediator Willets would be in touch with us the following week.

Q. Did Mediator Willets get in touch with you? [303] A. Yes, he did. He called me and came over, and we had

private discussions between just Mediator Willets and myself on the 23rd and the 24th, which was Monday and Tuesday. On the 24th, I believe, he handed me BRT proposal 2.

Q. When was the next mediation session? A. The next mediation session was June 24th on Wednesday of that same week.

Q. What happened at that meeting? A. Mr. Moore was not present at that meeting. At that meeting the general chairmen were there, and Mr. Maloney, Mr. Cardinal, Mr. Stahley, and Mr. Shannon.

Mediator Glover was absent. Mediator Willets was there.

We were represented by myself, Mr. Beisel and Mr. Humphrey.

Q. What happened at that meeting? A. At that meeting—this was the first time, of course, that the organization general chairmen had had a chance to discuss our proposal with me, since they were not there at the Friday meeting.

THE COURT: Your proposal No. 1? Your first proposal?

[304] THE WITNESS: Yes. Right, your Honor.

I explained it to the general chairmen, and Mr. Maloney, who did most of the talking, said again that the organization was not going to discuss main line jobs or agree to any changes in main line jobs, and of course reducing many main line jobs to one brakeman was an essential part of our first proposal, and he simply repeated what he had been telling me for a year, that they weren't going to discuss our proposal.

At that meeting, I also discussed their proposal No. 1, which was simply a return to 1 and 2, and repeated that I thought that an agreement here had to be based on North Western conditions. This proposal was not; it was simply a written confirmation of what they had been telling me all along, that everything had to be returned to 1 and 2 because that is what the other railroads had done.

I think that is about all that was said of any real substance at that meeting on June 25th.

Q. Did mediation resume the next day? A. Yes. The next day mediation did resume, [305] and I did not attend the entire meeting. I was there for some of it. Mr. Beisel and Mr. Humphrey of my office conducted most of it because the meeting was dedicated simply to explaining our job study results. We had promised the Mediator that we would give to the Union the results of our job studies.

At this meeting we had the summary sheets, and my staff members handed those summary sheets out and explained them to the organization representatives.

Q. And did the organization make any comment on the results of those studies? A. Well, when I was there they discussed the detail of the study, in other words, how it was done, and they again repeated that they did not consider it meaningful in making an agreement. I might add that Head Mediator Glover was still absent. This was being handled by his junior assistant up to this point, that week.

Q. The parties had an opportunity, though, didn't they, to meet with Mr. Glover on June 27th? A. Yes. On June 27th, Friday, Mr. Glover returned, and the first thing he did was ask for [306] a progress report as to what had happened. I made a report to him in effect that there had been no progress. The organizations were still insisting upon a 1 and 2 standard. I said they were even insisting upon the return of a brakeman to some of our pre-award 282 conductor and foreman only jobs. I said they were also insisting upon a return of certain third brakemen on main line way freight.

This was a relatively short meeting. Mr. Glover ended it by simply saying that we should come up, the carrier, with another proposal, and I agreed that I would. At this point each side had handed the Mediator one proposal.

Q. How many remaining mediation sessions were there? A. There were only, let's see, two sessions remaining.

Q. And those were the sessions on June— A. Monday, June 30th.

Q. And July 2nd? A. And July 2nd, but I did meet with the Mediator privately on Tuesday, July 1st.

[307] Q. What happened at the June 30th meeting? A. At the June 30th meeting I handed out Carrier Proposal No. 2 and I explained the difference between Carrier Proposal No. 1 and Carrier Proposal No. 2.

After I finished my explanation, Deputy President Moore again went back to the matter of other railroad settlements, stating that the North Western had to do the same as the others. He said a pattern is established, the North Western must do the same.

I replied by saying, well, these jobs are unneeded. What do we get in return? And there was no reply. Again I asked him, do you have any other ideas? And Mr. Maloney said it must be 1 and 2. The settlements on other railroads must be equaled by the North Western, the same as the Milwaukee, the same as the other western roads.

I again pointed to our study results, what they showed insofar as productivity was concerned, what efficiency, et cetera. They again repeated they didn't care about our studies.

I again suggested the possibility of looking into other rules, and I received a negative answer. I at that meeting, for the first time since [308] our March proposal, said, would you now be interested in additional money for the men, in sharing the productivity gains, and I promptly received a negative answer.

At that time Mr. Glover said, gentlemen, I am going to conclude the meeting, and I want the employees to bring in another proposal.

* * * * *

Q. At this June 30th meeting when the matter of additional compensation was discussed, was there any reference to certain statements that Mr. Luna had made in the L&N case? A. Yes. I believe I mentioned that Mr. Luna had made a statement in the L&N case to the effect that the BRT or UTU constitution prohibited money or offers of this type or discussion of them.

Q. The next mediation session, joint mediation session you had, was on July 2, is that correct? A. That is correct.

Q. What happened at that meeting? [309] A. At the July 2nd meeting, we discussed BRT proposal 3, and our proposals 3, 4, 5 and 6, which I have previously described.

BRT proposal No. 3 was the one which would have caused us to return 208 jobs to a 1 and 2 status of the 216. It was no meaningful departure from what they had offered me up to that point throughout our handling of this matter, and I told them that it was not a recognition in any way, shape or form of what this situation was at North Western, and rejected it.

They summarily rejected our proposals 3, 4, 5 and 6. 3 was the job proposal without the local arbitration provision; 4 was the overall arbitration proposal; 5 was the rules productivity proposal; and 6 was the suburban service proposal.

After the organizations rejected all six of our proposals, Mr. Glover asked if anyone else had anything else to offer. I replied that we had exhausted the approaches to this thing, we had offered every approach we could think of, and we had no more proposals, and the organization said they had none, at which time we ended the meeting.

Q. At that meeting did Mr. Glover hand you [310] a letter that he had received from the Trainmen representatives? A. Yes, he did.

Q. I now show you what has been marked for identification as Plaintiff's Exhibit 25. Would you identify that document, please. A. Yes. This is a letter addressed to Mediator Glover and signed by all five of our district general chairmen and Mr. Moore, Deputy President of the UTU, with a copy to Mr. Luna, Mr. Tracy, the Executive Secretary of the National Railway Adjustment Board, and to me.

It rejects our proposals and it speaks for itself.

MR. SCHMIEGE: Plaintiff's Exhibit No. 25 for identification is offered in evidence, your Honor.

THE COURT: It is admitted.

* * * * *

Q. Mr. Wolfe, when did the National Mediation Board proffer arbitration in this case? [311] A. The Mediation

Board proffered arbitration in this case on October 8, 1969.

Q. How was that proffer received by the parties? A. On October 10th, as I recall we received that proffer later on October 8—I am sorry. I will strike that.

The letter was dated October 8, your Honor. I think we received it on October 10th, and we answered on October 10th, the same day, unqualifiedly accepting mediation, and suggesting that the parties immediately meet to arrive at an agreement setting the procedure for the arbitration.

THE COURT: You meant you accepted arbitration, that is, you indicated that you would accept arbitration?

THE WITNESS: Yes, Judge.

* * * * *

[312] Q. Mr. Wolfe, when we recessed you had just testified that the North Western accepted the Mediation Board's proffer of arbitration. How did the union receive that proffer? A. The union rejected the proffer of arbitration.

Q. What action did the Mediation Board take then? A. The National Mediation Board terminated its file, that is, closed its services in the case by letter on October 16th, 1969.

Q. After the Board terminated its services, did you have occasion to resume negotiations with the union? A. Yes. On November 10th, 1969, Mr. Tuffley, the BRT vice president who met with me on August 6th, 1968, that one day, but who does handle other matters on our railroad, and I discussed resuming negotiations. We agreed to resume on November 12th, which was a Wednesday.

THE WITNESS: Now this is not uncommon, your Honor, in this industry. Under the Railway [313] Labor Act, the final 30 days cooling off period started to run when the Board closed its file.

THE COURT: I have had a good deal of experience with that, fellows coming in at midnight. I am familiar with it, but it does go on from time to time and then all of a sudden it stops.

THE WITNESS: Well, the stopping date here was the 16th, as you know. So, it is not uncommon that the parties will try to get together during that last 30 days, and that is what happened here.

THE COURT: They don't stop and start shooting at each other.

THE WITNESS: No, we don't. We certainly don't.

BY THE WITNESS:

A. (Continuing) In this telephone conversation we agreed to meet on the 12th. However, before we agreed to do that I told Mr. Tuffley I did not care to bargain under a strike threat to negotiate under a strike threat. And he said as long as we were meeting, the organization would not use self-help. However, to me that meant that once we broke off negotiations we did have a strike threat.

[314] We met from the 12th to the 16th—I mean—I am sorry. We met from the 12th through the 16th, that is right. Yes. Wednesday to Wednesday. That was a lost seven days. We basically did three things during that time. We spent two days identifying the jobs, again. This was Mr. Tuffley's first real exposure to the case, and we spent two days identifying the jobs. We spent another several days arguing over peripheral agreement language before we even approached the question of the number of jobs that would be operated 1 and 1 or 1 and 2.

We spent the remainder of the time in the same kind of discussion Mr. Maloney and I had had in August of '68, only this time it involved all of the jobs in all of the North Western districts. The end result of that was a union position that we could continue to operate 36 out of 216 jobs 1 and 1. Now that, as I said, was extremely consistent with Mr. Maloney's statement the first day we began negotiations that 80 per cent of the jobs must be returned 1 and 2. Now that was 36 and we ended up with 32.

Q. One last question, Mr. Wolfe, and that is [315] during the conferences that you participated in, that is, the conferences in 1968 and '69 during mediation and so forth, did the union representatives ever raise the argument that

from 1966 on their full-fledged bargaining had been interfered with because of the fact that during 1965, after the union had served its notices, the carriers had stated that those notices were premature? A. No, sir, they did not.

* * * * *

[316] CROSS EXAMINATION

BY MR. HALEY:

Q. Mr. Wolfe, to start backwards a little, you met with Mr. Tuffley after the Mediation Board had relinquished its jurisdiction and met with him on November 12th, 13th, 14th, 15th, and I think the 16th and 17th up through the 19th, didn't you, nearly every day including Saturdays and Sundays? A. It was one week including Saturday and Sunday meetings. It was from Wednesday to Wednesday, Mr. Haley.

Q. Your discussions with Mr. Tuffley were not nearly so cursory as your testimony a few moments ago would indicate, were they? Didn't you go over jobs by jobs, a list of jobs that were prepared that indicate one to the other whether you would agree that this one could be operated or would agree to operate it with two brakemen or two switchmen, or this one with one brakeman or one switchman? A. As I testified, Mr. Haley, we identified the jobs–

Q. Now when you say "identified," let's get the significance of the word "identify."

THE COURT: Let me ask this: How long [317] did the conference last?

THE WITNESS: Each conference, Judge?

THE COURT: This particular conference.

THE WITNESS: It lasted from Wednesday, November 12, we began at 1:30 in the afternoon–

BY MR. HALEY:

Q. And quit at 5:00 according to my notes. A. That is approximately right.

THE WITNESS: And we met Thursday in the morning and in the afternoon. We had met on Friday. We met on Saturday–

BY MR. HALEY:

Q. From 10:00 to 5:00? A. From 10:00 to 5:00.

Q. On Friday, I have. A. Well, on Saturday we met–

Q. 10:00 in the morning? A. 10:00 we began, yes.

Q. You went through until dinnertime? A. We went through until dinnertime.

Sunday we had, I think, a briefer conference. We did break for lunch, but I think we quit about 3:00 or 4:00, as I recall.

Q. You started in again the following week? [318] A. We met Monday, and we met on Tuesday. We broke up on Wednesday.

Q. Wednesday was your last day? A. That is correct.

Q. So you put in practically nine full days–ten full days? A. Well, it was a week, Mr. Haley.

Q. A week. At about, say, some sixty-odd hours we are talking, or thereabouts? A. I haven't added the hours up.

Q. I am just getting a rough guess. A. Well, I would have to sit down and calculate it.

Q. Now what you had was you had a list of jobs that were currently on which under Board Awards or agreements made under the Award of Board 282, the railroad was authorized to work at less than the jobs had been required to be manned before the Award of Board 282? A. We compiled such a list.

Q. You had a copy and Mr. Tuffley had a copy? A. It took us two days, a better part of two days to compile the list. We handed it to the union, I think, the third day.

[319] Q. In other words, it was a list by description of the job? A. It was a very simple list. It simply identified each job by name.

Q. Right. A. That is, and let me give you an example; in yard service at Clinton, Iowa, for example, we would list the 0-1 job, and list the 0-2 job and the 0-3 job.

Q. Do you have a copy of that here with you? A. No, I do not.

Q. Let me see if Mr. Tuffley has it so I can see if it is significant.

(Brief pause.)

MR. HALEY: We will make extra copies of this, your Honor, if we may.

Mr. Reporter, will you mark this as Defendant's Exhibit No. 2 for identification, please.

* * * * *

[320] Q. Let me show you what the reporter has marked Defendant's Exhibit 2 and ask you if that is what you call the identification of the jobs from which you and Mr. Tuffley were working? A. That is one of them. This is road service.

Q. This is road service. A. We had two.

Q. You had two? A. That is the end product, however, Mr. Haley. That is what came of the two days or the better part of two days' discussion. In other words, this wasn't agreeing on which jobs would be worked 1 and 1. We hadn't even approached that subject. This was simply attempting to identify what jobs we had authority.

* * * * *

[321] Q. What we have marked as defendant's Exhibit 2, you say, is road jobs? A. Right.

Q. Now what is the other that I hand you now which hasn't been marked yet, is that yard jobs? A. It is yard jobs. If you will let me look at it just a minute.

Q. Sure. A. Yes, that looks like the final product.

MR. HALEY: Mr. Reporter, will you mark this as Defendant's Exhibit 3 for identification, please.

THE COURT: I take it that when you say that is the final product that you were sitting there and you had lists of papers and you went over working papers, so to speak, and this is the final product at the end of the day; is that what you mean?

[322] THE WITNESS: Yes, sir. This was an agreed upon list, your Honor, that these are the jobs that we had authority to work 1 and 1. In order to arrive at that list we took a listing of all of our yard jobs. We talked from it.

THE COURT: I see. You had the work papers there besides this and from those work papers, your listings, this is the list that you came up with?

THE WITNESS: If I may, your Honor–
MR. HALEY: Let me see if I can get it.

BY MR. HALEY:

Q. We have now marked two exhibits, Defendant's Exhibits 2 and 3. Under the Award of Board 282, the North Western and other railroads that it acquired or merged with later, had obtained authority to reduce certain crews from what theretofore had been required under agreements or by practice? A. Yes, sir.

Q. Where before the agreement of the practice required a conductor and two brakemen or a foreman and two helpers, you had acquired authority to reduce it, the crew, from a conductor and two brakemen to a conductor and one brakeman or in a [323] yard crew from a foreman and two helpers to a foreman and one helper? A. That is right.

Q. In some instances to a foreman alone or one man alone? A. Right.

Q. Then what you did then when you commenced to reconsider these notices these exhibits that have been marked Defendant's Exhibits 2 and 3, No. 2 is the list of road crews that you were authorized or had been authorized to work with a fewer number than before the Award of Board 282? A. That is correct.

Q. The exhibit that is marked Defendant's Exhibit 3 is the list of yard crews that you had been authorized under the Award of Board 282 to work with a lesser number than was required prior to that time? A. That is correct.

Q. These were the crews some of which you were working with a reduced number and some of which you were not? A. Right, sir.

Q. But you had under the Award of Board 282 [324] acquired the right to work these crews with less than the number theretofore required, and these were the crews that you were negotiating about? A. Yes, sir.

[325] Q. All right. So that when you say you were identifying the jobs you mean that you were listing the ones that you had been authorized to reduce under Award

of Board 282 and that the union was trying to get increased; is that right? A. Those were the jobs that we had authority to operate 1 and 1. They wanted 1 and 2, absolutely.

Q. There were some jobs that you did not get the authority to reduce under the Award of Board 282, weren't there? A. Yes, sir, there were a few.

Q. Well, the Award of Board 282 didn't authorize any reduction in main line crews? A. That is right.

* * * * *

[327] Q. You proceeded under 282 and you asked for authority to reduce two hundred and some odd crews, I believe you said? A. I believe the number was 200 and—this is by Award now. We did it two ways.

Q. Let's do Awards. A. Let's take Awards first.

I think we asked for authority to eliminate the second man on 224 jobs.

Q. How many did you get from that? A. 194.

Q. 194? A. Yes.

Q. You got a pretty good average, then? A. 88 per cent.

* * * * *

[328] Q. Well, what percentage did the railroads get? You have been dealing in percentages. A. You mean the average percent?

Q. Yes. A. I can give you the average percent, but of course an average distorts the variances.

Q. Well, we have been dealing in averages. What was the average? A. The average of the group, I suppose, was over 80 per cent.

Q. I believe your dad said yesterday 87 per cent, I think he said, A. If my dad said 87 per cent, I will accept that.

Q. That is right. I think he did.

Did the North Western fare as well as the average? A. As well as the average, yes.

* * * * *

[329] Q. So then, this is what—during this week after the Mediation Board terminated its services these two exhibits that I hold in my hand, Defendant's Exhibits 2 and 3,

were the crews that you and Mr. Tuffley were discussing; is that right? A. With one qualification, Mr. Haley. I asked Mr. Tuffley if he was willing to discuss main line road service, our proposal, and he didn't answer me when I first asked the question, but the next day he told me no he was not willing to discuss it. So after he gave me that answer–you are right, the answer to your question is those were the jobs we discussed.

[330] Q. In other words, notwithstanding–your first question was will you talk about main lines, which you hadn't been able to reduce under the Award of Board 282? A. That is right, in which your people refused to talk to us about.

Q. At that time? A. At any time.

Q. Well, anyway you turned from that to these two lists that I hold in my hand, is that right? A. Well, you say we turned to it–that was a product of our efforts. We, at least, had the jobs identified.

Q. You talked about them for this week, is that right? A. Oh, no, no. After we identified the jobs we set that aside. Mr. Tuffley had another procedure he wanted to try. It was along these lines–Mr. Tuffley said, "Once we identify the jobs before we discuss what jobs should be 1 and 1 and what jobs should be 1 and 2, why don't we try and agree on the framework of agreement, language, putting aside completely the numbers on jobs." I said, "Mr. Tuffley, up to this point I have been unable to get your people to move in any direction off 1 and 2 and what other railroads did. I will be perfectly pleased to try your procedure."

So, for the next two days we fiddled around with peripheral agreement language that had nothing to do with the real merits, the guts, if I may, of this dispute.

Q. Are you saying you never got down to considering whether you would agree to change– A. I didn't say that. I said we did not address ourselves to that subject when we finished identifying the list, and that was your question.

Q. All right. Did you at any time during this time you discussed these jobs that are listed here ever indicate to Mr.

Tuffley that the North Western would be willing to increase the number of helpers on any yard crew or the number of brakemen on any road crew? A. I certainly did.

Q. Did he indicate to you that he would be willing to leave some at 1 and 1 the way they were? A. Yes, as I testified, the final offer before the organization broke up our negotiations was 32 [331] jobs that they would permit us to operate 1 and 1 which was absolutely consistent with what they had said they were going to do the day we started negotiations in April of 1969.

Q. You indicated to Mr. Tuffley you would make some concessions from your position and he indicated he would make some from his, is that right? A. Mr. Haley, I had to in order to see how far they would go.

Q. Just answer that question, will you, please. Is your answer yes? A. Yes.

Q. Now, Mr. Wolfe, when you made these job studies that you keep talking about, what you did you sent out instructions to people to make a time and motion study of certain crews; is that right, how they spent their time? A. Work studies, or some people call them time and motion studies.

Q. Time and motion studies or work studies? A. [illegible] sir.

Q. Did you make them in the light of the guidelines of the Award of Board 282? A. A work study is simply made—is a study [333] of what the people actually did, performance of work in time frames, Mr. Haley, and that is exactly what it was.

Q. Whether they are standing still or whether they are moving or whether they are setting a brake or whether they are giving a signal or whether they are climbing a boxcar or whether they are riding a boxcar or what they are doing? A. That is right.

Q. You are not representing to this court that you and I or that a superintendent and a local chairman can observe the same crew from day after day and day after day and arrive at the same result as to whether that crew should

have two helpers or one helper? There is a basis for a difference of opinion, isn't there, even under the guidelines? A. There is a basis for a difference of opinion, I suppose, in almost anything.

[334] Q. In other words, you don't necessarily arrive at the same result if you are James R. Wolfe, Vice President of Personnel, or Maloney, General Chairman? A. Mr. Haley, four years of experience convinced us quite well that we needed only one man. This was simply trying to convince your side.

Q. That is your view. A. This is experience. We did it for four years.

Q. Well, that is your view.

Mr. Maloney and Mr. Tuffley and Mr. Moore hold a different view, don't they? A. They hold a view that all jobs had to be restored to 1 and 2 because that is what the other railroads had done.

Q. Well, those railroads that made agreements like that, they agreed to that, didn't they? A. They certainly did.

* * * * *

[335] Q. Now one of the guidelines—well, let me ask you first; the North Western operates in Kansas City, Missouri alongside the Kansas City Southern; isn't that right? A. That is right.

Q. You operate in Chicago alongside a lot of other railroads.

What railroads—in what places does the North Western operate where at the time you were having these discussions other railroads operated that had already settled their crew consist? A. If I understand you correctly, you are asking me at what locations do we operate where other railroads had settled their crew consist issue?

Q. Right. In other words, you keep saying some other agreements were being suggested to you or the union was arguing that you should make an agreement such as—I think you said, the Milwaukee. Had the Milwaukee settled a crew consist agreement? A. It certainly had.

[336] Q. Were you familiar with the provisions of the Milwaukee agreement? A. Reasonably familiar.

Q. Did you testify—I understood you to testify yesterday that part of your job was to keep with agreements that were made on other railroads. A. Yes, that is right. When I said "keep up" I charge collecting them and I look at them.

Q. Were you conscious when you were talking with the general chairmen and the vice-presidents of the UTU about this crew consist dispute as to the nature of the agreements that had been made on the Milwaukee? A. I certainly was. It conformed exactly with what Mr. Moore said, a national pattern.

* * * * *

Q. Were you familiar with the agreement that [337] had been made on the Burlington? A. Yes, sir.

Q. What about the Santa Fe, do you run alongside the Santa Fe? A. Do we run alongside the Santa Fe?

Q. Anyplace. A. I don't believe so.

THE COURT: You may have some parallel—generally speaking, parallel in the same direction but not close to each other?

THE WITNESS: That is right, your Honor. We run out through Glen Ellyn and Wheaton and that territory and the Santa Fe runs down through the southwestern part of Chicago.

Q. What do you have at Kansas City, between here and Kansas City? A. Between here and Kansas City?

Q. Yes. A. We have a line of railroad.

Q. And the Santa Fe had one between here and there? A. Yes, but they aren't very close together.

Q. They aren't very close together? A. No.

[338] THE COURT: They cover the same general direction and arrive at the same points sometimes.

MR. HALEY: Yes.

I will ask the reporter to mark these as Defendant's Exhibits 4 and 5.

Q. I show you and ask if you are familiar with what has been marked Defendant's Exhibit 4, which was marked Employees Exhibit 11 in the proceedings before Emergency Board 172. Are you familiar with that? A. No.

Q. Would you look at the list of the agreements that are contained in there, and I will ask if you are familiar with any of those agreements. A. I am reasonably familiar with some of them. I have read most of them at one time or another. Yes, I have some knowledge of them.

Q. Are those the agreements that it is part [339] of your duty to keep up with? A. We have a file of these.

Q. Will you look at Defendant's Exhibit 5 and the list of agreements that are listed there, Crew consist agreements. Are you familiar with those?

* * * * *

A. My answer would be the same, some general knowledge.

* * * * *

Q. If you will quickly go through here, Mr. Wolfe, through Defendant's Exhibit 4, and just take the list and indicate, if you will, the railroads which operate in the same areas in which the North Western or its subsidiaries operate that are listed there? I know the Burlington is in there. A. The first listing is the Luna-Saunders [340] Agreement Railroads. Without going over each one, they are all eastern railroads.

Q. Some of those operate in the Chicago area. Chicago River and Indiana is a switching railroad here in Chicago, isn't it? A. Well, Chicago is the western terminus of some of these railroads, and Chicago is the eastern terminus of the North Western.

Q. Will you just indicate by looking at them the ones that operate here in Chicago the same as the North Western. They have yards here and some main lines running here? A. Erie Lackawanna is one.

Q. The Erie Lackawanna? A. Yes. The Penn Central; the Baltimore and Ohio—that is about it.

Q. And the Baltimore and Ohio has got a Chicago terminal, right? A. Yes, the B&OCT.

Q. What about the Chicago River? That is a switching railroad, isn't it? A. That is part of the Penn Central system.

Q. Would you indicate them by names so the record will show it? [341] A. Indiana Harbor Belt and Chicago River and Indiana are both Chicago switching terminal companies.

Q. And the North Western? A. We certainly operate in Chicago.

Q. It has switching yards in Chicago? A. Yes.

Q. Go ahead and get the rest of them out of there. A. The Gulf, Mobile and Ohio operates into Chicago.

Q. And has yards in the South Side of Chicago? A. Along the Stevenson Expressway, as I recall it.

That is about it, the first page. Milwaukee, of course.

Q. That is the Milwaukee East? A. Well, the Milwaukee Railroad, period.

Q. It comes in here? A. Yes, the Milwaukee East. Then Milwaukee West, I suppose, if you want to divide it up into different regions.

Q. It is covered by two different agreements, isn't it? [342] A. Yes. Milwaukee East would be in the same area as the North Western. Milwaukee West would not be.

The Santa Fe, very loosely, only because of the fact that it operates in Chicago and Kansas City, and has a line to Kansas City, but under your definition, I suppose it would be the same area.

The Burlington; Toledo, Peoria and Western, the same area.

That is all.

* * * * *

Q. Will you look at Defendant's Exhibit 5 and indicate which of those railroads operate in the same area with the North Western? [343] A. Let's see. The Norfolk and Western, formerly the Nickelplate, I think it comes into Chicago. The Rock Island has a Kansas City terminal. We have a yard in Kansas City. Peoria and Pekin Union Rail-

way, and we go through Peoria. The Des Moines Union Railway. The Great Northern has several common points with us. The Belt Railway of Chicago; the Illinois Central; Chicago Shortline is in Chicago. The Chicago and Eastern Illinois touches Chicago. The Sioux City terminal, we do operate to Sioux City. That is a terminal company. The Minnesota Transfer Railway would be similar.

That is it.

[344] Q. Now the railroads that you testified the unions were urging, the railroads which made contracts with the union that were being urged upon you by the union, that was principally the one made by the Burlington, is that right? A. No.

Q. Is that one of them? A. No, that is not right.

Q. Which were the ones? A. More often than not they simply referred to it as a national pattern. That would be all of them.

Q. With certain specific ones? A. However on certain occasions certain general chairmen referred to the Great Northern, the Milwaukee, the Burlington.

Q. The Great Northern, the Milwaukee and the Burlington? A. Those were on certain occasions, but generally it was the national pattern.

Q. Now as you have read these agreements from time to time, do you find any two of them that are identical? A. I find—that are identical?

Q. Yes; that are the same. [345] A. In what respect, Mr. Haley?

Q. Well, do they all establish the same rule, precisely the same rule, or is it the same general rule with varying exceptions? A. Yes, they generally establish the same rule. Over 90 per cent of the jobs would be returned to 1 and 2.

Q. How do you arrive at that 90 per cent figure? A. 90 per cent of the total jobs operated in road and yard service.

Q. Where do they get that information? A. Where do they get that information?

Q. Yes. A. Off of Form A that is supplied the Interstate Commerce Commission of crews operated on Class 1 railroads

Q. So how do you arrive at—you take the reports made by all the railroads in the United States? A. On the monthly agreements that were made, and we have found, as Mr. Moore testified, there is in fact a national pattern, and that pattern is 93 to 100 per cent of the jobs returned 1 and 2.

Q. But the agreements will differ and vary [346] from railroad to railroad? A. In very minor respects insofar as that pattern is concerned that I am talking about.

Q. But they do differ? A. Well, the range is 93 to 100 per cent.

Q. Do you know of any that got 100 per cent back? A. A hundred per cent back? All the Luna-Saunders agreements roads did.

THE COURT: All which?

THE WITNESS: The Luna-Saunders roads, all the eastern roads, did.

BY MR. HALEY:

Q. But the Luna-Saunders agreements did not provide a uniform rule of two helpers in yard service and two brakemen in road service? A. The Luna-Saunders agreement provided just that.

Q. No. Didn't it provide, Mr. Wolfe, for many, many 1 and 1 crews? A. No, sir.

Q. You are sure of that? A. The Luna-Saunders agreements?

Q. Yes. [347] A. Yes, sir; reasonably sure.

MR. SCHMIEGE: Mr. Haley, before you require an answer from Mr. Wolfe, would you show him the Luna agreement?

MR. HALEY: Yes.

BY MR. HALEY:

Q. I think you will find it provides for 1 and 1 where 1 and 1 was the rule before? A. Where 1 and 1 was the rule before Award 282?

Q. Yes. A. Well, that isn't a substantial number, * * *

A. On the North Western, for example, we have three, and I suspect it is virtually the same on other railroads. The Luna-Saunders agreement is basically a 1 and 2 return of all crews, and Mr. Luna has described it as such himself.

Q. With the exception of some crews, and we don't know how many, and I don't think—do you know how many? Can you tell me? A. No, I don't but I do know it is very few. I know that. I couldn't tell you the exact number. [348] It is de minimus.

Q. And that agreement, of course, was made without the threat of a strike and at a time when no strike was possible? A. That agreement was entered into because of the consideration the previous witness testified to.

Q. I didn't ask you that. It was made when there was no strike and no strike was possible? A. Not possible?

Q. Legally not possible because of Public Law 88-108? A. I think that is probably right.

* * * * *

Q. * * * Now, then, the first written proposals that were made by either of the parties, as I understand it, was a proposal that was put in evidence by you, a proposal by the employees, and that is Plaintiff's Exhibit 16, I believe. It proposes a rule of conductor and two brakemen in road freight service, is that right? A. That is the first section, yes.

[349] Q. Now it says it will not disturb the crew consist provisions of Rule 49. That is another rule, apparently, that exists on the North Western. Do you know it by number that way? A. Yes. That is the one I mentioned in my direct testimony that prior to Award 282 it required us to staff certain main line way freights with a third brakeman, and that provision in the agreement was a mistake, really. Rule 49 already had been disturbed, you see, by Award 282, and if they wanted to put it back in, that wasn't the way to do it.

Q. I see. But you took it to mean they wanted certain jobs restored to three helpers or brakemen? A. Exactly. It was an artful way of doing it.

Q. Otherwise they were proposing a conductor and two helpers? A. Aside from that they were proposing a conductor and two. That would be a conductor and three going back before the award, as I said.

Q. Then Section 2 covering all passenger and suburban trains with three cars or less, a conductor [350] and one brakeman. What was the rule prior to that. A. We don't have any rule.

Q. So they wanted a rule where there was none. Now then in Section 3, it talks about passenger and suburban trains, four cars or more, consist of a conductor and two brakemen. Had there been a rule like that before? A. No, sir.

Q. So that was something new. Then Section 3 covered yard service, and they proposed a rule of a foreman and two helpers. A. Right, sir.

* * * * *

[351] Q. Now then, the North Western responded to that proposal with, I believe it is, Plaintiff's Exhibit 20. A. I don't know the number. I can tell you whether it is our first one if you show it to me.

Q. I believe it is Exhibit 20? A. No, that is not the first one. I think the first one would be Exhibit 19.

* * * * *

Q. All right. Then that is the North Western's response to the Union's proposal. A. Well, it is our first proposal.

Q. And in it the union has now proposed a basic rule of conductor and two brakeman or three [352] brakemen on a few crews, a conductor and two brakemen on the rest of the road crews, and a foreman and two helpers in the yard crews. Now, then, what is your response to that? A. Well, as I described it before, our proposal No. 1 is a treatment by individual jobs what we considered the North Western manning needs to be.

Q. What did you consider them, as expressed in your view? Just summarize it for the Court. A. I did, but okay. In Section 1, we specified five jobs that we had worked under 282 with one helper that would be returned to two.

Q. In other words, you proposed then that you would retain, you would increase five—what are those, yard crews? A. Five yard jobs.

Q. Five yard crews from 1 and 1 to 1 and 2? A. That is correct.

Q. Instead of all of them that the union proposed. A. In Paragraph 2 we proposed that three branch line road jobs that had been worked with a conductor and one brakeman for four years under [353] the award would be returned to two brakemen.

Q. Out of how many? A. Out of how many road jobs?

Q. Yes. A. Oh, I think we are presently working about 51 road jobs.

Q. So that is three out of 51? A. That is what we are presently working. We have additional authority, but it is 51 that we are working.

Q. Back to the first one on the yard jobs, you offered to increase five out of how many? A. Five out of 180 that they were working 1 and 1, and about 216—wait a minute. I am wrong about that. Strike it. That is total.

About 129 that we were actually working 1 and 1.

Q. And you offered to increase how many, eight? A. Five.

Q. Five? A. Yes.

In Paragraph 3 we stipulated to all other 1 and 1 jobs would be retained in that position or [354] status.

Then in Paragraph 4 we listed 63 additional yard jobs that we would work with one helper instead of two.

Q. In other words, you proposed to reduce some that you didn't have authority to reduce? A. Oh, absolutely. That is what we need. We don't need the second man on the jobs.

Q. That is your judgment? A. That is our judgment, the judgment of practice, what we have been doing the last

four years, the judgment of all the studies we have conducted. It is based on all of those factors.

[355] Q. Your proposal then was a further reduction in how many crews? A. In yard service it would have been a further reduction of 63.

Q. And that would have resulted in a net loss of 48 or 58? A. It would have just been 63 additional jobs that we would operate 1 and 1.

Q. That you wanted the authority reduced from 1 and 2 to 1 and 1? A. That is right.

Q. But you had proposed you would increase five from 1 and 1 to 1 and 2? A. As I testified before, we have changed conditions. Things do happen on the railroad.

Q. On the balance sheet, you wanted to take away more than you were willing to add to it, is that right? A. We served a proposal, Mr. Haley, as you recall which would have given us complete managerial discretion.

Q. Right. A. And this is simply putting down in writing how we would implement that proposal on the specific job.

[356] Q. But these are the figures? A. Yes.

Q. What is the next part? A. The next paragraph deals with way freight or switch runs that we presently were working 1 and 2, that we would work 1 and 1.

Q. In other words, you proposed further reductions in those crews? A. Most certainly. Absolutely. On many of those jobs as we list them here, an additional thirty, where the second man simply goes along for the ride.

Q. In your judgment? A. In the judgment of myself and our operating department.

Q. With which the union doesn't agree? A. The union insists on its standard return 1 and 2.

Q. They are not willing to accept your judgment? A. They rejected this out of hand, and they refused to discuss both branch line road service and main line road service in any detail.

Q. They did discuss it some? You mean they just said, oh, Mr. Wolfe, we aren't going to talk to you about this?

[357] A. Mr. Haley, that is exactly what they said up until the final two or three days that we met with Mr. Tuffley. That is the first time we really got down to discussing at all branch line road jobs. Yes, that is right.

Q. Of course, your proposal all the way through was to discuss them one at a time? A. My proposal was to do exactly what Mr. Luna told the Court that we ought to do, to analyze each job, the conditions, the characteristics–

Q. Let's go on. A. (Continuing)–and he knocked us out of national handling with that testimony.

Q. He did? A. And brought us down to the local level, and when we got down to the local level, they say let's do it nationally, and use the national pattern.

Q. Mr. Luna was supported by the Court of Appeals, the PRC? A. Yes, and you turn around and do the opposite of what you told the Court we ought to do.

Q. All right. Have we covered the summary of that one? A. No, I am not through. We also proposed [358] that through freight trains make no more than five pick-ups and set-outs, excluding bad orders and hot box set-outs, et cetera, from final terminal to initial terminal, would be worked with a conductor and one brakeman. Those are our manifest hot-shot trains that go from one point to another without working, without making stops, and have absolutely no need on those assignments for the second man.

Q. In your viewpoint. A. In my viewpoint and everybody else on our end of it.

Q. That was your proposal? A. That is right.

Q. And that was delivered by you to the union on June 20, 1964? A. Friday, June 20, yes, sir.

Q. After you had received the union proposal on June 18–I mean 1969. You testified the union proposal you received on June 18, two days before? A. That is right.

Q. Then the union's next written proposal was four days later, was it not? That is Plaintiff's Exhibit 17. You received that on June 24, 1969? A. Yes. That is the second proposal, yes. [359] This is their second proposal.

Q. Will you just summarize for the record so that these are chronologically in the record. What was the union's next proposal? A. Yes. I testified on direct that this proposal, in paragraph 1, would permit us to operate five yard assignments with one helper. That is five of those that we had authority and did operate under 282. It would cause us to restore a brakeman to three under 282 foreman only jobs, and it would cause us to add a third brakeman to certain main line way freight jobs.

Q. It was, of course, a retreat by the union from its first proposal? Maybe not in your judgment a substantial retreat, but it was a retreat? A. Well, it speaks for itself, I believe.

Q. Could you answer the question? It was a retreat.

THE COURT: Was it a step backward?

BY THE WITNESS:

A. Certainly it is not all crews 1 and 2. They would let us operate five with 1 and 1 so–

BY MR. HALEY:

Q. So basically the union first proposed a [360] general rule of 1 and 2 with no exceptions. Your counterproposal was to keep what you had of crew consists of 1 and 1 with thirty exceptions reducing some crews. Now the union comes back with a modification of its basic 1 or 1 and 2 with some exceptions to it, is that right? A. Well, it was no modification or change from the employees' position as stated by Mr. Maloney the first day we met, an 80 per cent return to 1 and 2, and they never retreated from that position.

Q. It is a retreat from the first written proposal? A. It is that, yes, sir.

Q. Then your next proposal following that was, I believe, Plaintiff's Exhibit 20, which is Carriers' Mediation Proposal No. 2, is that right? A. Yes, sir, that is right.

[361] Q. Now if you will just quickly summarize it as to what your proposal was, compared with what the union proposed. A. Well, this proposal, your Honor, very briefly

simply eliminated removing of the second helper from all of the yard jobs and branch line road jobs and main line through freight jobs that were working 1 and 2 at the time we made the proposal. It limits its treatment to 1 and 1 jobs that we had authority to operate under 282, and in that respect it would change five of those jobs from one helper to two. It would change two of the road jobs from one helper to two–

Q. That is seven new jobs that you were willing to increase? A. It would change five of the yard jobs from two helpers to one.

Q. Reduce five yard jobs? A. And change three of the branch line jobs from two brakemen to one.

Q. In other words, reduces those? A. Yes. Now both of our proposals 1 and 2 I might add, also contained a procedure for handling crew consist changes subsequent to the date of the [362] agreement, which as I testified to before is quite important in our opinion.

Q. With the ultimate result being arbitration if you couldn't agree? A. Local arbitration, local third party handling.

Q. Right, and of course you were aware, as you have been throughout this whole crew consist dispute, of the union's opposition to submitting crew consist to final and binding arbitration? A. They normally oppose that, yes.

Q. And of course, you knew that when you made that counter proposal? A. Well, I know that they oppose, that they have opposed arbitration on many occasions, and they have agreed to it on many occasions.

Q. But not on crew consist. They are strongly opposed to arbitration on crew consist? A. I am sure they have probably agreed to arbitrate crew consist matters at times, Mr. Haley. I wouldn't say they have approved it in every instance. I am sure there have been occasions when they have. It is a very sensible solution, and we proposed it as such.

Q. In your judgment. [363] A. Certainly.

Q. When was it that you delivered Plaintiff's Exhibit 20, which is your mediation proposal No. 2, to the union? I

don't have the date on that. A. I would have to check my conference notes on that.

Q. Would you do that? A. Yes, sir.

Q. If the record shows it, I didn't get it in my notes. A. You are talking about carriers' proposal 2, right?

Q. Right. The employees was on June 18th, and your response was June 20th. Now we are down to Plaintiff's Exhibit 20, which is your proposal No. 2, and when was that? A. I believe it was on the 24th.

Q. Of June? A. Yes, that is right—no, I am sorry. I am sorry about that. It was Monday, June 30th.

Q. June 30th? A. Yes.

Q. Then after that the unions made a proposal that was delivered to you on July 1st? [364] A. That is right.

Q. And it has been marked Plaintiff's Exhibit 18. Will you summarize it for the record. A. I think I can summarize this quickly by simply saying that to the five jobs that I mentioned before, that we would be permitted to continue to operate with the one man, it adds three more.

Q. It increases, in other words? It is a little bit more of a retreat from the union's initial position? A. Not from its initial position. It is a little step from its initial proposal, written proposal, that is right. But it is still well within the initial position stated the first day of the conference.

Q. But it is a retreat from the initial proposal? A. Initial written proposal.

Q. Initial written proposal, all right. Then you made the carriers' proposal No. 3? A. I guess it would be—

Q. That has been marked Plaintiff's Exhibit 21? What was the date you gave that to the union? A. Let me see. I believe we handed the [365] Mediator carriers' proposals 3, 4, 5 and 6 on July 1st. We exchanged those with him when we were handed the last BRT proposal.

Q. You gave them all to him at the one time? A. 3, 4, 5 and 6, yes. We had orally proposed three at the preceding meeting. We reduced it to writing and handed it to him on the 1st. In addition, we handed him 4, 5 and 6.

Q. Then let's look first at your proposal No. 3, and if you will tell the Court, summarize it for the record as to what it proposed and what was the change, if any, between it and the last prior written proposal? A. Our last prior written proposal, of course, was a tremendous compromise for us because it came down completely from our proposal. It simply eliminated our proposal, and you must, starting a discussion like this, you have to start with our proposal and the opposition proposal, and so when you consider the carriers' proposal 2, it was a complete comedown off of our proposal and it was a substantial compromise. This one embodied that same principle. It is the same identical proposal from the standpoint of jobs.

Q. That is what we are interested in. [366] A. But it eliminates–

Q. The proposal for arbitration, that is the only thing? A. The proposal for local arbitration which the opposition objected to. That is the only change from proposal 2.

Q. So it reflects no change except, as I say, as to jobs, but only for arbitration. A. It is a complete compromise coming off our proposal.

Q. Of unrestricted managerial prerogative? A. It is not unrestricted managerial prerogative. It is a comedown completely off of the jobs we had listed that we wanted to operate 1 and 1 on proposal 1, which embodied and was put in the proposal on the basis of our notice that we served on the organizations. It was a virtual withdrawal, if you want to so speak, of our notice in written proposal form.

[367] Q. All right. Now the proposals 4, 5 and 6– proposal 4 proposes arbitration again? A. Yes, proposal 4 proposes third party determination of the entire crew consist matter at that time.

Q. In other words, third party determination, otherwise arbitration? A. Yes, sir.

Q. I don't know why we can't call it just arbitration. A. I like to, but some of your people object to that term. I don't know why either.

Q. Then in proposal No. 5, you want to know what the union would trade you for increasing some crews that they sought to increase? A. Yes. As I said, we were examining different approaches in an attempt to get them off this national pattern position.

Q. And on your last proposal, that didn't deal with jobs except to retain what you had on a three-year moratorium and you would trade that, and then you would give the union the five-day work week in suburban service? A. Yes, they had been negotiating that proposal–

[368] Q. It really didn't propose a change in the existing operation of yards or road jobs? A. It proposed a crew consist status quo.

Q. Yes, of what you had. A. That is right.

Q. You would keep what you have for three years? A. And again it was a complete withdrawal of our proposal.

Q. Of your exclusive managerial discretion? A. Of our right to get into mainline road service and other branch line jobs and other yard jobs. We have 750 assignments on the railroad, you see.

Q. But you had authority only to operate a much less number? A. We had authority to operate 216.

Q. So actually what was in dispute– A. Of course, we really have authority to operate far more than that. We have authority to operate 107 jobs in Wisconsin, but because of the Wisconsin full crew law, we couldn't do it. So our authority was well over 300.

Q. But as a practical proposition, it was [369] just over 200. A. That is right.

Q. And that is what is involved here? A. Yes. But my answer wouldn't have been correct if I hadn't made that qualification.

MR. HALEY: I will ask that this be marked Defendant's Exhibit 6 for identification.

Q. I show you, Mr. Wolfe, what the reporter has marked Defendant's Exhibit 6, and ask you if that is the letter that you sent to Mr. Arthur Glover of the National Mediation

Board before mediation commenced? A. Well, it is dated June 5. Mediation commenced on June 2, so it is not before mediation commenced.

Q. Well, concurrently or substantially concurrently with the commencement of mediation? A. It is after we had our first meeting with the organizations and after I had had two meetings with Mediator Glover, yes.

* * * * *

[371] Q. Mr. Wolfe, I showed you these and I would ask you to look again at Defendant's Exhibit 4 what purports to be in it the agreement between the Chicago Milwaukee, St. Paul and Pacific Railroad Company lines east and the Brotherhood and check it and see if it substantially states your understanding of what that agreement was? A. Yes, sir, it does.

Q. Would you summarize it for the record? Don't lose the place. Would you summarize the agreement, then, for the record as to what you understand? A. It permits the Milwaukee to operate 38 jobs with one helper.

Q. In other words, it establishes a general rule of a conductor and two brakemen and a foreman and two helpers with how many exceptions? A. 38.

Q. 38 in yard service? A. Yes, which is, as I recall, something like 96 per cent of their total jobs.

Q. What are the exceptions in road service? [372] A. The exceptions in road service? Well, that is road and yard, the 38.

Q. That is road and yard? A. Yes, sir, that is the total.

Q. Now would you look at the agreement that purports to be the agreement between the Chicago Burlington & Quincy and the Brotherhood— A. Do you have that marked?

Q. Yes, that is 29, I believe it is there. A. I have it.

Q. Does it express what you understood or what you understand to be the agreement between the Burlington and the Brotherhood of Railroad Trainmen? A. It does.

Q. Would you summarize it for the record? A. It permits the Burlington to operate, I think, around 30 jobs with 1 and 1 which is about 93 per cent of their total.

Q. In other words, it again establishes a basic rule of a conductor and two brakemen or a foreman and two yardmen with how many exceptions? A. About 30.

Q. About 30? A. It is another example of a national pattern [373] that the organizations attempted to impress upon us.

Q. Would you look at Defendant's Exhibit 5, what purports to be a copy of the agreement between the Great Northern Railway Company and the United Transportation Union and state for the record whether that reflects your understanding of what that agreement was? A. Yes, sir. This is the agreement and it would permit the Great Northern to operate approximately 20 jobs with one brakeman or helper. I think for the Great Northern it is about a 95 or 96 per cent result. Again, well within the national pattern that Mr. Luna has now impressed upon the railroads.

Q. It establishes a general rule of a conductor and two brakemen or a foreman and two helpers, with those exceptions? A. That is right.

Q. There was no strike called by the union against the Great Northern or against the Burlington or against the Milwaukee East? A. They had threats of strike.

Q. They had threats? A. Yes, they certainly did.

Q. But no strike was actually called? [374] A. No strike was actually called because they settled before they could be struck. They settled because they were threatened to be struck.

Q. Well, that is your opinion. A. That is my opinion, yes.

Q. That is your opinion. A. That is my opinion based on information that has been supplied me.

MR. HALEY: Then I move to strike it because it is based on hearsay.

THE COURT: That may be stricken.

[375] Q. Those were the agreements that were urged upon you by the union, principally? A. No, Mr. Haley. As I said before, the union urged on us all of the agreements that had been made with the other railroads, and it

was expressed in terms of You must take the National pattern which is over 90 per cent returned to 1 and 2 and we will not negotiate anything else with you. It must be that.

THE COURT: What he is asking you is, now that he has summarized these, these are the agreements that they were talking about.

THE WITNESS: It is three of them, your Honor.

THE COURT: Well, that is three of them.

THE WITNESS: Yes, but not all.

THE COURT: This is three of them.

THE WITNESS: Just an example of three.

* * * * *

[377] Q. Did you have anything to do with the [378] proceedings of the Presidential Railroad Commission? A. Yes, sir.

Q. What was your connection there? A. I was one of the Southeastern counsel that represented the Southeastern Railroads before the PRC.

Q. You were one of the railroads' lawyers appearing before the Presidential Railroad Commission? A. One of many.

Q. But you were one of them? A. I was one of them.

Q. You were, of course, of counsel in the proceeding in the case that originated in this court, the Brotherhood of Locomotive Engineers and the other operating unions against the B&O that was tried by Judge Perry? A. Yes, I was with Mr. Neitzert and Mr. Lucente in that case, yes.

Q. Did you represent any of the railroads in any of the proceedings before Emergency Board 154? A. Yes, sir, I was Southeastern counsel before that Board.

[379] Q. Did you participate on behalf of any of the railroads in the negotiations that followed the report of Emergency Board 154 and the enactment of Public Law 88-108? A. No, sir.

Q. Did you participate as representing any of the railroads in the proceedings of Arbitration Board 282? A. Yes, sir; I was counsel for the Southeastern Railroads before Arbitration Board 282.

Q. Did you assist in the preparation of the evidence in the presentation of evidence on behalf of the railroads before that Board? A. I was responsible for the firemen manning portion of that case, Mr. Haley, but not the crew consist case.

Q. Not the crew consist? A. That is right. Mr. Lucente had the crew consist case and I had the fireman's case.

* * * * *

[380] Q. The fireman issue and Mr. Lucente had the crew consist? A. And both of us were supervised quite closely by Mr. Neitzert.

Q. So you were the same ones that had been in the case that originated earlier in this court involving the right of the railroads to promulgate their November 2nd, 1959 notice? A. That is right.

Q. The same group of lawyers stayed with the whole case? A. Well, not exactly. I would not be correct to give you an unqualified answer there. There were some changes, but basically it was the same group.

Q. And you worked with them all the way through? A. Well, each region, you see, at that time the railroads were represented regionally, and each region had its own counsel.

Q. The Eastern Carriers Conference Committee had its counsel, the Southeastern Carriers Conference had its counsel, which you were one, and the Western Carriers Conference Committee had its [381] own counsel? A. That is right.

Q. Then later on they formed the National Railway Labor Conference consisting of all three? A. That is correct.

Q. Then you became general attorney for the consolidated group, is that right? A. Yes, Mr. Charles Hopkins and I became general attorneys of the conference.

Q. You and Mr. Hopkins? A. That is right.

Q. That was in 1964? A. In the summer of 1964, yes.

Q. That was during the time the Award of Board 282 was in effect? A. Yes, sir.

Q. Were you in the capacity of general attorney for the National Railway Labor Conference when the unions served on certain of the railroads their Section 6 crew consist notices in June and July of 1966? A. Yes, sir.

Q. Or '65. A. '65 is when they served the notices, the [382] summer of '65.

Q. Did you have any part in the advice that was given by the National Railway Labor Conference to the railroads upon whom those notices were served and not to negotiate on those notices with the union? A. Are you referring to the position of the railroads that the notices were premature because they were served during the period of the Award?

Q. Yes. A. Yes, I did participate in the legal thinking along with the other lawyers who were working at that time, and along with the Shea firm that handled the case.

Q. In Washington? A. Yes.

Q. So you did have a part in the preparation or determination that your father testified to yesterday of the instructions of the National Railway Labor Conference to the North Western Railroad and others not to negotiate with the unions on those Section 6 notices and to take the position that they were premature and didn't require negotiation at that time? [383] A. Well, Mr. Wolfe consulted with his lawyers normally and took their advice and then made his decision.

Q. After those notices were served, or after the railroads took that position, you were aware, I take it, that the unions sought services of the Mediation Board when the railroads would not negotiate on those notices? A. I believe I testified briefly to that, Mr. Haley. As I recall it, the notices were served in July, and the railroads answered that the notices were premature, and that the organizations began to invoke the services of the Board pretty shortly thereafter.

* * * * *

Q. Late summer and fall? A. That is right.

[384] Q. After the railroads took the position it did on the notices? A. That the notices were premature as being served during the period of the award.

Q. And refused to negotiate on them? A. Because they were premature–

Q. Just answer the question. They did refuse to negotiate? A. Yes.

* * * * *

Q. Then did you play any part or have anything to do with the determination of the National Railway Labor Conference to suggest or direct the North Western Railroad and others to serve the December 1965 Section 6 notices? A. I don't recall. I am sure that the question probably came up and the lawyers were asked their opinion.

Q. Then subsequent to that did you -

THE COURT: May I interrupt?

Did you have the opinion that it would [385] be good strategy to serve such notice in the event your viewpoint should be wrong about the prematurity?

THE WITNESS: Yes. Judge. They had served notices and we thought that normally you want to serve counter-notices to them. However, in the letter that went out we did ask for initial conferences on both their notices and ours in that letter which accompanied our notice, and the unions refused to meet. I mean, that is part of the story and I think you want the whole picture.

* * * * *

Q. The National Mediation Board had been requested to assume jurisdiction of the dispute arising from the unions' June and July 1965 notices.

[386] And then did you appear before the National Mediation Board early in 1966 as one of the attorneys representing the National Railway Labor Conference and the North Western and other railroads urging the National Mediation Board to handle the dispute on a national basis rather than on an individual railroad basis? A. Yes, sir. Only we took off our lawyer hats and we were representing the Con-

ference Committee at that meeting more as negotiators than lawyers, but we did take that position.

Q. You did appear before the National Mediation Board, the full Board at that time? A. It was not the full Board. We appeared before Member Edwards, as I recall. O'Neal was not there, and Gamser came in sometime later. So, it was really before only one member.

Q. You were appearing on behalf of all the railroads urging the Mediation Board to require the unions to engage in national handling and not to handle the disputes on an individual railroad basis? A. Absolutely. That was our position. It had always been handled that way. We were trying [387] to impress the Board with the righteousness of our opinion.

Q. Who participated in that, if I may call it, hearing? A. I wouldn't call it a hearing. It was simply a meeting.

Q. Well, let's see, Mr. Edwards was one of the members of the Mediation Board at that time? A. That is right.

Q. So was Mr. Gamser and so was Mr. O'Neal? A. That is right.

Q. Now then, you were one of the lawyers representing the National Railway Labor Conference and in turn the North Western Railroad; is that right? A. Mr. Charles Hopkins and myself, both general attorneys of the National Railway Labor Conference, were there representing all of the railroads which had furnished the conference with their powers of attorney.

Q. And that included the Chicago and North Western? A. That included the Chicago and North Western; that is right.

Q. As well as the other 80 railroads that had [388] been served with notices? A. Whoever had given us their power we were representing.

Q. Was anyone there from the Shea and Gardner firm? A. No, sir.

[389] Q. Did you make an argument of any kind before Mr.—did you say Mr. Gamser heard you? A. No. Mr. Edwards was the member of the Board who conducted

the meeting. The meeting was between representatives of the employees and representatives of the railroads.

Q. Who represented the employees? A. A number of vice presidents, and there were several general chairmen. The vice presidents that were there that I remember were Mr. Ray Jones–

Q. General chairman Alfred Smith off of the Missouri Pacific? A. Off of the Missouri Pacific. And your eastern general chairman off of the–

Q. Roger Jordan off of the Atlantic Coastline? A. I mean, your eastern vice president–

Q. Mr. Weil? A. Yes, Mr. Weil was there.

Q. Was Mr. Chester there? A. Yes, Mr. Chester was there.

Q. Mr. Jordan off of the Atlantic Coastline? A. That is right.

Q. Alfred Smith and Mr. Green and Mr. Clayton off of the Missouri Pacific? [390] A. I remember there were some general chairmen there but I don't remember all of their names, Mr. Haley. But I do remember the vice presidents because they were the ones who did the talking.

* * * * *

Q. You were heard by Mr. Lev Edwards of the National Mediation Board? A. Yes.

Q. Was he chairman at that time? A. I don't know.

Q. Were you subsequently advised by the National Mediation Board what its position or what it was going to do, whether it accepted or rejected or advised of any decision by the Board in any writing? A. My memory is a little foggy on that.

Q. My recollection is that you were. A. I think that is probably right. The Board did–

Q. Reject your contention. A. Well, I am not sure it was an outright [391] rejection in terms–in writing, but the Board did begin to release individual cases.

Q. They began to mediate on a railroad by railroad basis? A. As I say, released, yes, mediate–or assign a mediator to certain railroads.

Q. In other words, they didn't go along with your argument whether it was a formal decision or not? A. As I say, they simply released some railroads so they didn't do exactly what we asked them to do.

Q. They proceeded on an individual railroad basis? A. They started to, yes.

Q. About this same time in January of 1966 the Akron, Barberton and Belt case was filed? A. Yes.

Q. It was filed, you recall, the date—if I suggest to you January 21, 1966, would you agree with that? A. I probably would. I am sure you know. If you say that is what it was, I will agree.

* * * * *

[393] Q. But the Akron, Barberton and Belt case we are speaking of, it was the first named of some 170-odd plaintiffs? A. Well, there were a lot of them. I don't know if it was 170 or not. If you say so, I will accept your word for it.

* * * * *

Q. Of which the North Western was one of the plaintiffs? A. That is right.

* * * * *

[394] Q. Subsequently, Judge Holsoff rendered an opinion that the 1965 notices became effective January 25, 1966 and subsequently, then, did you participate in the decision to advise the railroads to undertake initial negotiations on the properties? A. Yes, I think I did participate insofar as advising our clients, the negotiators, what we thought should be done.

Q. But by that time the National Mediation Board had assumed jurisdiction of the disputes arising from all of the notices served by the [395] union and all of the notices–counter-notices served by the railroads? A. It had assumed jurisdiction?

Q. Yes, and had given the disputes separate numbers. A. Well, the Board did give them separate numbers because mediation was invoked at different times by the organizations.

Q. Right. So they had docketed the disputes? A. They had docketed a number of the disputes, yes. But the Court, of course, had held in Akron, Barberton that the meetings were ineffective, the initial conferences, you see.

* * * * *

[396] Q. Then the mediation continued until late in 1966—the Mediation Board terminated its services first on the Atlantic Coastline, Boston and Maine, and Des Moines Union Railroads? [397] A. That is right.

Q. Did you participate in the determination to file what became known as the Atlantic Coastline case? A. Yes, as I recall, the conference lawyers gave their opinions to their clients on that matter.

Q. In that case you contended that the refusal of the unions to bargain on a national basis as the railroads had demanded was a violation of the unions' duty under the Railway Labor Act? A. That is right, * * *

* * * * *

Q. During the time those cases were pending [398] no negotiations were carried on on the North Western Railroad or any others that you know of? A. You are now speaking of the Atlantic Coastline litigation?

Q. Yes. Well, in the Akron, Barberton and Belt litigation, that was still going on too? A. Once the litigation was filed, the Mediation Board simply did not assign mediators and no negotiations were conducted. You are right.

* * * * *

[399] Q. While those cases were pending, the Mediation Board did continue mediation because before either one of them was concluded, either of the two lawsuits or before the Akron, Barberton and Belt case was concluded, the Mediation Board terminated its services in the Atlantic Coastline, Boston and Maine and Des Moines Union disputes? A. I was talking about, Mr. Haley, while the [400] Atlantic Coastline case was pending, which raised the question of national handling.

Q. All right. A. The Mediation Board did not activate any of the cases and assign mediators. I assume that is the reason a mediator was not assigned on the North Western.

[401] Q. Immediately after the Mediation Board terminated its services on the Atlantic Coastline, Boston and Maine and Des Moines Union, within two weeks it terminated its services on the GM&O? A. Yes.

Q. Within a month after that it terminated its services on the Southern, the Missouri Pacific, the Union Pacific, the C&O that I can think of now. A. When were those dates, do you remember?

Q. It terminated its services in November of 1966 just after the Atlantic Coastline case was filed. Because subsequent to that, if you will recall, the C&O case was filed in the District of Columbia after five different lawsuits had been filed in five different places; Cleveland, St. Louis– A. But those terminations came, didn't they, after the Court of Appeals had ruled?

Q. No. While they were pending.

* * * * *

[402] Q. So the Mediation Board continued mediation? A. Not on the North Western.

Q. There is nothing, so far as you know, to prevent parties from negotiating while the case is in mediation, is there? A. Well, but you see–no, there isn't anything as long as the parties agree on the procedure to follow. That was the dispute that was in the courts. The railroad took the position that this was a matter for national handling. Mr. Luna took the position that on crew consist you had to go back to the–to each individual railroad because of the conditions on each railroad and bargain it on each railroad. So, obviously if either side–to negotiate one side would have to give up its position.

Q. Of course, I understand it takes two to tango. But the railroads made no effort to settle the dispute except through the litigation? A. Well, neither did the unions. The reason for it was because of the litigation.

[403] Q. I have particularly in mind the Norris-LaGuardia Act when I ask this question: Did the railroads make any effort, during the time that litigation was pending, to resolve the dispute by negotiation?

THE COURT: You mean the North Western?
MR. HALEY: The North Western.
THE COURT: You are talking about the North Western?
MR. HALEY: Including the North Western.

BY THE WITNESS:

A. The last effort the North Western made was rejected by the unions. In fact, the North Western made three offers to negotiate and the unions rejected those offers.

BY MR. HALEY:

Q. They made no attempt to negotiate on national handling? A. There were meetings in January, * * * in June of 1966 and in [404] August of 1966. The North Western made offers to negotiate in March of 1966 which were rejected by the union.

* * * * *

Q. And nothing more until after the Supreme Court decided—or denied certiorari in the Atlantic Coastline and Akron, Barberton and Belt case in January of 1968? A. Mr. Haley, the North Western had gotten a letter from the National Mediation Board telling us a mediator would be assigned to the case when the board's schedules permitted it. In the parlance of railroad procedure you wait until the Mediation Board assigns a mediator. That is the way every dispute is handled, and that is what happened here.

Q. There is nothing required or preventing any railroad from seeking agreement during that time, was there? A. Well, the customary procedure and the normal way of handling labor relations under the Railway Labor Act and in this industry is just as I have described.

Q. But the North Western so far as you know did not— [405] A. We were awaiting the assignment of a mediator.

Q. And awaiting the outcome of the litigation? A. At the same time, yes.

Q. Now then, after the Supreme Court denied certiorari in the Akron, Barberton and Belt and Atlantic Coastline case in January of 1968, did you attend a meeting of representatives of the Illinois Central Railroad, the North

Western Railroad, the Richmond Fredericksberg and Potomac, the Louisville and Nashville, and the Kansas City Southern with respect to offering money to settle the crew consist issue? A. No, sir.

Q. You were still at that time connected with the National Railway Labor Conference? A. That is right.

[406] Q. Were you aware that such a meeting was held? A. No, sir.

Q. Let's see, when did you take over? You were elected– A. April 3, 1968. I was elected but I did not come in full time with the North Western until June 1st.

Q. You didn't have anything personally to do, then, with the decision of those representatives of those railroads to seek to settle crew consist for $3.45 instead of an additional man? A. I was not at that meeting. I did not participate in it.

Q. When did you learn of that meeting and of that offer, or that proposal? A. Immediately upon being elected vice president of the North Western, I believe, the 1st of April or during the first part of April.

Q. Were you aware of the conduct of the Illinois Central and the Louisville and Nashville and the Richmond Fredricksburg & Potoma, and the Kansas City Southern in attempting to settle the crew consist dispute with the employees for $3.45? [407] A. The way that you phrased the question, Mr. Haley, I will answer it this way: I was aware of those railroads communicating through their house organs and otherwise with their employees, but I was not aware of any effort to settle it with the employees.

* * * * *

Q. You were aware of the communications, then, that were going on from the various railroads to their employees? * * * A. Yes, that is right, I was aware of them. But we on the North Western did not engage in any of those communications after I arrived at the North Western.

Q. None? A. None.

Q. You served no Section 6 notice on the unions proposing a disposition of the crew consist [408] issue by the

payment of additional money? A. A letter was sent to our general chairman in March of 1968 proposing that the matter be settled by paying our incumbent employees a thousand dollars a year extra.

Q. At the rate of $3.45 a day? A. That is right, $3.45 a day. That was summarily rejected. We sent copies of that letter to our employees. That was done before I came to the North Western and that was after—and we accepted the general chairman's rejection. Once I came to the North Western we did not communicate anymore with our employees in that respect.

Q. It was not treated as a Section 6 notice, is what I am trying to arrive at. A. It was a part of the handling of the crew consist dispute, the notices that were presently pending, Mr. Haley.

Q. It wasn't pursued as a Section 6 notice? A. Well, we already had Section 6 notices.

Q. I mean, that the money offer was not—

THE COURT: It was not considered separately as a Section 6 notice?

[409] THE WITNESS: No, Judge. It was a part of the pending dispute.

THE COURT: Well, he wants to pin it down that you did not start a new Section 6 notice.

THE WITNESS: No, it was not a new Section 6 notice.

* * * * *

Q. You didn't mention money in your negotiations with the union again until just during the Mediation proceedings, as you testified earlier, which occurred this year? * * * A. Yes, I was exploring every possible approach. I simply brought that up and I said, [410] "Would you fellows at this time be interested in money?" And they said, "No."

Q. That was the next time— A. Yes.

THE COURT: That was not in pursuance of that original notice as a Section 6 notice, but what you did then was just in pursuance of further negotiation of the original Section 6 notice?

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THE WITNESS: That is right, Judge.

* * * * *

Q. I believe you testified that negotiations were commenced on the 1965 notices as a result of a meeting between Mr. Luna and Mr. Heineman, and you mentioned somebody else– A. Mr. Provo, our president.

Q. Allright. That occurred in March of– A. March 19th, 1968.

* * * * *

Q. Then, almost three years since there had been any talks, any crew consist talks between the union and the Chicago North Western? A. No.

[411] Q. In '65? A. In August of '66.

Q. August '66. Then almost two years, then? A. Well, August '66 to March of '68.

* * * * *

Q. Following that then, of course, you made some studies of the crews as to how they were being operated, whether they number that were being operated with a conductor and two brakemen or a foreman and two switchmen and the number that were authorized to be operated with less than that and the number that were really being operated; is that right? * * * A. Are you referring, Mr. Haley, to the studies that Mr. Luna and Mr. Heineman and Mr. Provo discussed at that meeting?

Q. And that was subsequently made, I believe you testified. A. Well, I just wanted to know which one you are talking about.

Q. Those are the ones I am talking about. [412] A. Yes, at that meeting Mr. Luna contended that 1 and 1 operation was inefficient because we were spending a lot of money on overtime. He said that his people had figures to that effect and that they had made studies. Our representatives indicated that we would immediately set down and make studies and we would exchange those studies.

At the first meeting on May 16th I gave them my study but they never gave me anything to this day. So there was

no exchange. We gave them a study and they gave us nothing. Those are the studies you are talking about.

Q. Let me ask you this: Do you, as the vice president of personnel and the contacts you have, do you really have to have a job study, a study job-by-job to form a judgment as to whether that crew can safely do the work it does with less than two helpers or with only one? A. I think, Mr. Haley, in my own opinion on a subject such as that you certainly should make a job study unless you had made one recently on the same job in order to see exactly how the job is operating. Mr. Luna testified to that effect. He indicated that that should be done. He and I agree on that.

[413] Q. Let's just take practical operating men. Have you ever switched any boxcars? A. No, I don't believe I have. I sure watched a lot, though.

Q. Would you say that a General Chairman who commenced as a switchman and represents switchmen or a General Chairman who was a brakeman and who represents brakemen or a conductor and represents conductors needs a job study in order to form a judgment as to whether the work of a particular crew requires to avoid an undue work burden or a safe operation one or two helpers? Does he have to have a time and motion study in order to form a judgment of that? A. He has to know what the job is doing in concrete factual terms, not in speculation. He has to know how many cars it is handling. He has to know how many hours the job is being worked. He has to know the physical conditions of the terrain where the job he is working. He has to know the nature of the work the job does. That is, in my opinion, Mr. Haley—that is my opinion, but it also is Mr. Luna's opinions. It is the opinion, I think, of almost anyone who has ever discussed this subject.

[414] You have to know what the job does in order to make an evaluation. You don't get that by osmosis.

Q. You get it by day-by-day personal contact with the work? A. By obtaining the facts as to what the job does, and those facts change.

* * * * *

[415] Q. One thing, Mr. Wolfe, so we can get it straight. One of the contentions that you make here in this case is that the union has not acted in compliance with the Railway Labor Act in refusing national handling at this point. How would you conceive of the union engaging in national handling at this point, which you are aware, I am sure, when the union has reached an agreement with practically every other railroad in the United States? Now how would we go about this? What is your contention? A. Well, Mr. Haley, our contention is that the unions have used local handling to create a national pattern. And here they aren't engaging in local handling. You see, they haven't met us on the local grounds. They have told us that we have to do what the other railroads have done and the other railroads have all had to do the same thing. Therefore, all we are saying in effect is that if in fact if the union has engaged in good faith bargaining then in fact this must be handled nationally because that is the kind of bargaining they have conducted. The way they would do it is simply serve a notice. [416] All of these agreements are open end. Serve a notice and handle it concertedly like crew consist was always handled. It is a very simple matter.

[417] Q. Then you would suggest at this point the UTU now re-serve a crew consist notice on every railroad on which it has now reached a crew consist agreement and also serve another one on the Chicago and North Western and then that we reinstitute this dispute all over again and handle it nationally like it was done from 1959 on? Is that what you are suggesting? A. Mr. Haley, what I am suggesting, if I may put it in my own words–

Q. I wish you would. A. –is that if we are correct in our position, our alternative position that this matter is one for national handling, then the union in fact has made

all of these agreements unlawfully with all of these railroads because they did it on a local basis in accordance with the ACL decision. And in that case, certainly the union should be forced to go back and do it on a national basis by serving notices on everyone.

Q. In other words, we should undo all of the agreements that have been made? A. If it was done unlawfully I should certainly think so.

[418] Q. Then we should start all over and go back to where we were November 2nd, 1959; is that what you are suggesting? A. I am suggesting that we should go back to where we were at the expiration of Award 282 and start from there by eliminating—by taking a look at what is an appropriate crew consist.

Q. Then we should go back and proceed on a national basis so that if we didn't reach an agreement on a national basis we could have another national emergency and another compulsory arbitration; is that what you are suggesting? A. Oh, I am not suggesting that at all. How many national emergencies do we have? This industry has been engaged in national handling for years. You can count the national emergencies on one hand. The crew consist matter was handled nationally up until Mr. Luna convinced the Court of Appeals in the District of Columbia that it should be handled locally. The only national emergency we ever had, Mr. Haley, was the one that stemmed from the 1959 notices.

All I am suggesting is that if Mr. Luna got these railroads in this position in an unlawful [419] manner then the matter should be handled in a lawful one which is national handling.

Q. Wasn't it the railroads' proposed action in 1963 that precipitated a national emergency? A. In 1963?

Q. Yes. The railroads' promulgation of its November 2nd, 1959, notice. A. Well, the promulgation doesn't cause any national emergency.

Q. Not if the unions want to live with it. A. That is right. Exactly. The strike is what causes the national emergency.

* * * * *

Q. In your testimony about being urged by the union or other agreements made by the union with other railroads being urged as a basis for settling the unions' dispute with the North Western you regard that as an improper move on the part of the union? [420] A. I certainly do, Mr. Haley. Mr. Luna said before in the Atlantic Coastline case that insofar as wages were concerned he could not have—he could not afford to have different settlements in the same yards at the same locations. But he said insofar as crew consist is concerned, that matter should be handled individually because the conditions in each yard are different, whether there are four yards in Chicago or 20 yards in Chicago, and it should be settled by each road individually on its own conditions. That isn't what they did with us. They said you must do what these other people did.

[421] Q. That was also a position that the carriers took before Board 282, wasn't it? A. What?

Q. That conditions vary from yard to yard from time of year to time of year. A. Yes.

Q. Then you would disagree with one of the guidelines established by Board 282— A. I don't disagree with any of the guidelines established by Board 282, Mr. Haley.

Q. Let me ask you about this one: Is this one of the? That the Special Boards of Adjustment should take into account practices regarding the consist of crews in comparable situation where such practices are not in dispute and yet you urge that where the parties had settled them by agreement those agreements should not be urged upon the North Western as a comparable situation? A. Mr. Haley, I am saying that the imposition by the unions of a return to a 1 and 2 status is handling the matter nationally by using whipsaw strikes locally and that is exactly what they are trying to do to us. They did it continually through our negotiations. They took away the strength of [422] the bargaining unit by Mr. Luna's testimony that this was a matter for local handling, and then when we go to local handling they attempt to impose a national rule on us.

Q. Mr. Luna's position in the Atlantic Coastline case—were you there when he testified or have you read his testimony? A. Yes, I was there and I read it.

Q. —was that national handling had never been had absent agreement between the parties, and that it was inappropriate on certain subjects including crew consist. A. Well, yes, he testified that national handling was inappropriate and that is one reason the Court of Appeals ruled that it was. But then his organization has turned around and attempted to impose national handling on us individually.

Q. He also testified that national handling had never been had except by agreement and that without an agreement national handling was not permissible. A. Of course, that isn't so. It has been handled without agreement. The National Mediation Board has conducted mass mediation on a number of [423] cases, which is concerted national handling without the agreement of either side.

Q. That is the mediation, but the movement was not agreed to as such. A. The Board simply brought the parties in, but I don't think that is too important here.

[424] Q. Actually, as a matter of fact, up to this point the North Western has not actually been threatened with a strike, has it? A. Well, Mr. Haley, on that, I have testified to the conversation that I had with Mr. Tuffley where I stated that I would not bargain under the threat of a strike. He testified as long as we conferred they would not use self-help, however, they broke off negotiations after they were free to strike, and I considered that as a threat.

Also, when we broke up negotiations several of the general chairmen were heard to say, "All right, boys, let's get the placards and the signs ready." So, there were a number of things that happened that indicated—affirmatively indicated to us a threat of strike.

Q. Now you spoke a lot about whipsaw strikes and that sort of thing. I want to be sure that we understand each other.

The only strikes that have actually occurred over crew consist were Atlantic Coastline, the Missouri Pacific, the L&N, the Belt, and the IC; is that right?

THE COURT: So far as there has been any [425] evidence here.

MR. DEMPSEY: The L&N twice, Mr. Haley.

MR. HALEY: Pardon?

MR. DEMPSEY: The L&N twice.

MR. SCHMIEGE: The L&N was struck twice.

MR. DEMPSEY: And the Texas and Pacific and the T&P.

MR. HALEY: Well, the T&P is part of the Missouri Pacific.

THE WITNESS: It is a separate railroad.

* * * * *

I can't disagree with my lawyers. If my lawyers say yes, I am not going to disagree with them. There were many other threats, though, on other railroads.

* * * * *

Q. But those are the only ones that occurred? A. Actually struck, yes.

Q. There was a promulgation by the Southern which didn't provoke a strike? A. Are you referring to the promulgation by the Southern at the time the Atlantic Coastline was struck and the Missouri Pacific?

Q. Yes. [426] A. Yes, certainly they didn't strike because the carriers were attempting to maintain the integrity of the bargaining unit and it was part of the unions' strategy not to strike.

Q. But they didn't strike? A. No, it was part of their bargaining strategy not to.

Q. But they didn't? A. They didn't.

Q. Okay. Now you have answered the question. Thank you.

The Boston and Maine promulgated and there was no strike? A. The same thing, part of the union bargaining strategy, they did not strike.

[427] Q. The Union Pacific promulgated and there was no strike? A. The same thing, part of the unions' bargaining strategy not to strike.

Q. The C&O didn't promulgate and there was not a strike. A. They did not, no.

Q. But they had the right at the same time. A. Once again, part of the unions' bargaining strategy. They wanted to isolate the ACL and squeeze it, whipsaw.

Q. You would consider, I guess, the whipsaw to be immoral but not illegal? A. Absolutely.

* * * * *

Q. Back to patterns, it has just been suggested to me—the unions are not the only ones that follow patterns, the railroads follow them just as well when they can, don't they?

Isn't that your purpose in national handling? [428] A. You are talking about wage cases, Mr. Haley.

Q. Well, let's talk about them all. You say there ought to be a national handling in everything. What is that but pattern negotiations? A. Well, we argued that this case should be handled nationally. We argued that the crew consist would, but the Court of Appeals of the District of Columbia circuit held that it should be handled locally.

THE COURT: May I ask this question: If this case had been, so to speak, handled nationally, in what manner would the negotiations have been different?

THE WITNESS: Well, Your Honor, the negotiations would have been considerably different because we would have maintained the integrity of our bargaining unit and there would not have been a restoration of all of these 1 and 2 jobs.

BY MR. HALEY:

Q. The end result, absent agreement, would have been exactly what was about to occur and what Congress prevented in 1963, wouldn't it? [429] A. But you would have had to strike them all at the same time. You could

not have whipsawed them and the result would have been tremendously different.

Q. In other words, the railroads feel they would benefit–

THE COURT: Is it your position, then, from a national handling the only difference would be that all of them would be handled together and they would all have to strike or non-strike; is that your position?

THE WITNESS: Yes, Your Honor. The result would have been different because of that.

BY MR. HALEY:

Q. The railroads attempting to act nationally in the machinist case that was settled today, were the railroads there again acting concertedly? A. Yes, sir.

* * * * *

CROSS EXAMINATION
(Resumed)

[433] Q. Mr. Wolfe, I am going to show you what has been marked by the reporter as Defendant's Exhibit 7, and you have a copy of it in your hand; that is the notification by the National Mediation Board of its termination of its jurisdiction of the [434] dispute between the Union and the Chicago North Western? * * * A. Yes, this is, as we call it, the closing file letter.

Q. That is addressed to you and Mr. Luna? A. That is right.

MR. HALEY: Your Honor, we offer Defendant's Exhibit No. 7 into evidence.

* * * * *

THE COURT: Admitted.

* * * * *

REDIRECT EXAMINATION

BY MR. SCHMIEGE:

Q. Mr. Wolfe, when you testified yesterday, Mr. Haley asked you what you thought the union should be required to do if it had improperly refused [435] to engage in

national handling. You said to him that no circumstances the union should not be permitted to require the Chicago and North Western to negotiate individually but rather that negotiations should be handled on a national basis. You also referred to this as an alternative issue. Would you explain what you meant by that, please. A. Yes. As I said yesterday, national handling is one of our issues. If the Court should rule that this is a matter for national handling, then the only way you could effect changes in crew consist rules would be by that method. However, we do have another issue. If we are right on the other issue, the Court need never reach the issue of national handling. This other issue involves the North Western.

Very briefly, the other issue is this: We say that the union refused national handling. We say that it represented to the District Court in the Atlantic Coastline case that national handling was not appropriate. We further say that the union represented to the Court in that case that the appropriate way to negotiate was on a local basis predicated on a close examination of local conditions [436] on each railroad. We say that the Court ruled—the Court of Appeals ruled on those representations that that was in fact the way to do it. We say, that being the case then Section 2, First, obliges the union to proceed in that manner. But as I testified yesterday, that is exactly what they have not done on the Chicago and North Western.

Throughout our negotiations on the North Western, from the very first, they have insisted on a national pattern of agreement. From the very first they insisted on a return of 80 per cent of the jobs to a 1 and 1 basis, and on our last meeting they ended up right at about that position. It was a take it or leave it proposition. That simply is not negotiating.

Now if we are right on that issue, then, of course, what we are asking the Court to do is to restrain a strike unless and until the union engages in honest to goodness negotiations on the merits, on the dispute on the Chicago and North Western Railroad.

Now, in these meetings we took the position that that is exactly what the right thing to do, that is what the right thing to do is for the [436-A] railroad and its employees. We insist that the union having made these representations that that is the manner to handle this dispute, that it should be held to its word. That is the other issue.

Q. I have one more thing to ask you about National handling. At one point in your cross examination yesterday, the Court asked you what difference there would have been had this dispute been handled nationally. You pointed out that the union would not have been able to conduct whip saw strikes and destroy the strength of the railroads' bargaining unit. You also said that the results would have been different. What did you mean by that? A. Well, here is what I meant by that; the result of the union being able to employ all of its strength against a single railroad in whip saw fashion in order to obtain a national agreement is simply that there is no discussion on the merits. The bargaining power is overwhelmingly on one side. The union simply states its demands. The railroad can try their best, but when bargaining is conducted in that fashion, when the bargaining unit is broken, the company is simply whistling in the wind. And that is exactly what happened on the North Western. That is what happened on these other [436-B] railroads. And the result, of course, is strife and strikes one after another. And with forced settlements of this kind where there is no give and take on the merits, the agreements that have been made won't hold. These railroads that have made these agreements, they know that they have been done in returning all of these jobs to 1 and 2.

* * * * *

* * * I will shorten it up. What I am really saying is the only way to have stable relations is for the parties to sit down and debate the merits, how many men are really needed in terms of safety work load, operating conditions, examine the records on overtime, the cars handled, et cetera.

Now the result, of course, in that kind of [436-C] a give and take is that neither side will be entirely happy with the result. But both sides are likely to think that the result is within the range of reason. That is what I meant when I said the results would be different.

* * * * *

* * * It is certainly true that in attempting to estimate what might happen if this matter had been handled nationally, I can't say exactly. But experience does indicate that if it had been handled nationally, we probably would have had a uniform disposition on issues such as job protection, the procedures the parties were to follow, the guidelines that were to be employed on each railroad, and of course, the final step would be an implementation locally of those guidelines. Now, that is what I think would have happened. The short of it is you would have had out of national handling something that the parties could have lived with if there actually had been a give and take on the merits of the dispute. In my opinion, that is what bargaining under the Railway Labor Act is all about.

* * * * *

[437] Q. Now yesterday you told Mr. Haley that in the final week of discussions with the union, that would be in November of 1969, that you would not negotiate under the threat of strikes, but on direct testimony when I asked you a question in that area you said that you had told Mr. Tuffley that you had not—that you would not "care to" negotiate under threat of strike.

Can you explain that little variation in language? A. Yes, I can. I misspoke the second time. My original testimony was right. Of course, I would bargain under threat of strike or under an actual strike. What I meant was that in my view our discussions would be more productive if they were conducted not under a strike threat.

* * * * *

[PLAINTIFF'S EXHIBIT 13]

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF RAILROAD TRAINMEN
CHICAGO & NORTH WESTERN RAILWAY

March 14, 1968

Mr. A. E. Myles
Director of Labor Relations
C. & N.W. Railway Company
Chicago, Illinois

Dear Sir:

This will acknowledge your letter of March 8, 1968, addressed jointly to Mr. W. H. Callies, General Chairman, Order of Railroad Conductors and Brakemen and to the undersigned, relative to the pending crew consist notices on this property.

It is noted that, after having resorted to every device at the command of the carriers to delay and prolong this dispute, including the federal courts, and after having refused to bargain on technical grounds in disregard of the provisions of the Railway Labor Act, you now come forward with an offer to substitute money for a safe crew compliment—a settlement which is contrary to the policy of this organization as you are well aware.

We are not willing to enter into negotiations on such a proposal, and you are hereby advised that same is not acceptable.

Presently, the dispute is under the jurisdiction of the National Mediation Board, and we are awaiting the assignment of a mediator. We should be willing to enter into formal discussions with you in an effort to reach a settlement in the interim period to expedite the matter, with the understanding that if a settlement is not reached, our efforts will not disturb the status of the pending request for mediation.

Please advise if you desire to make an attempt to reach a settlement pending mediation.

Yours truly,

/s/ Gerald R. Maloney
General Chairman

[PLAINTIFF'S EXHIBIT 14]

March 8, 1968

Mr. W. H. Callies
324 East Wisconsin Avenue
Milwaukee, Wisconsin

Mr. G. R. Maloney
14 East Jackson Boulevard
Chicago, Illinois

Dear Sirs:

Please refer to previous correspondence concerning the ORC&B's Section 6 notice of March 23, 1965 and the BRT's Section 6 notices of July 6, 1965 relative to your desire to amend the existing agreements to provide that in all classes of road service the minimum crew should consist of not less than one conductor and two brakemen, and in all classes of yard service the minimum crew should consist of not less than one yard foreman and two helpers, and the carrier's counterproposals of December 24, 1965 to the BRT concerning consist of road and yard crews.

For the purpose of disposing of these notices, and without prejudice to my position that the ORC&B notice is unlawful and not a bargainable matter, I am willing to enter into an agreement providing for an additional allowance of $3.45 to the conductor or yard foreman, and $3.45 to the brakeman or helper, on each crew in road freight or yard service consisting of a conductor and only one brakeman, or a yard foreman and only one helper, with the understanding that this agreement will also provide for the

use of radios by yard or train service employes without any additional allowance.

These are particularly critical moments in history for the railroads and the thousands of persons they employ. Faced with an unprecedented onslaught of competition from trucks, barge lines, pipelines and airlines, railroads must stay in competitive trim. The days when railroads could simply pass along higher costs to the shipping and consuming public are long since gone . . . with the wind.

This intensive competitive pressure makes it imperative that both railroad management and railroad employes work to enable the industry to meet the competition—indeed, to make the competition. We sincerely believe that where management is able to eliminate unproductive positions, thus streamlining its operations, the industry will become more competitive. This, in our judgment, will mean more business and more jobs.

Still, progress is never one-sided. Railroad management believes that when competitive efficiency and productivity increases, resulting benefits can and should be shared. We believe our present proposals for higher pay for men working on one-and-one crews fairly recognize the wage-productivity principle.

If you are agreeable to disposing of the matter in this manner, please advise and we will prepare a memorandum agreement to cover.

[PLAINTIFF'S EXHIBIT 15]

CHICAGO AND NORTH WESTERN
RAILWAY COMPANY
LABOR RELATIONS DEPARTMENT

March 13, 1968

ALL CONDUCTORS AND TRAINMEN:
YARD FOREMEN & HELPERS (Except M&StL Dist.):

The crew consist issue, which involves formal demands from the ORC&B and BRT for a rule providing for one conductor and two brakemen and one yard foreman and two helpers for all crews in road and yard service is enormously important to everyone—employes, management and the general public.

Because of the importance of this to you and your families we feel it is essential that you be informed of the progress and status of efforts to resolve the issue and particularly to the proposals made by management. Our proposals would, in our judgment, result in a fair, honorable and peaceful resolution of the issue.

Specifically, for members of one-and-one crews in road freight and yard service, management has offered to increase your pay by $3.45 daily. This means a wage increase for you of at least $75 a month, or about $900 annually.

It's hardly news to anyone, no matter where he works, that the cost of living keeps spiraling. Prices for everything from box cars to bread, microwave to milk, keep going up. And just as surely as housewives must constantly seek to provide the best meals for her family out of funds available, so too must corporations strive to live within their budgets.

These are particularly critical moments in history for the railroads and the thousands of persons they employ. Faced with an unprecedented onslaught of competition from trucks, barge lines, pipelines and airlines, railroads must stay in competitive trim. The days when railroads could

simply pass along higher costs to the shipping and consuming public are long since gone . . . with the wind.

This intense competitive pressure makes it imperative that both railroad management and railroad employes work to enable the industry to meet the competition—indeed, to make the competition. We sincerely believe that where management is able to eliminate unproductive positions, thus streamlining its operations, the industry will become more competitive. This, in our judgment, will mean more business and more jobs.

Still, progress is never one-sided. Railroad Management believes that when competitive efficiency and productivity increases, resulting benefits can and should be shared. We believe our present proposals for higher pay for men working on one-and-one crews fairly recognizes the wage-productivity principle.

Perhaps most important of all, however, we believe it is essential that you, our employes, be kept thoroughly informed of what efforts are being made to resolve these difficult questions. Only then can you give these questions the thoughtful consideration they deserve. They are much too important to all of us for it to be otherwise.

/s/ J. M. Van Patten
Vice President-Labor Relations

[DEFENDANT'S EXHIBIT 6]

CHICAGO AND NORTH WESTERN RAILWAY COMPANY
400 WEST MADISON STREET, CHICAGO 60606

JAMES R. WOLFE
VICE PRESIDENT-LABOR RELATIONS

June 5, 1969

Mr. Arthur J. Glover
National Mediation Board
c/o - Atlantic Hotel
316 South Clark Street
Chicago, Illinois 60604

Re: Mediation Cases A-7523 and Sub 1, A-7524 and Sub 1, A-7525 and Sub 1, A-7526 and Sub 1, A-7645 and Sub 1 and A-8011

Dear Mr. Glover:

As you know, we welcome the assistance of the National Mediation Board in the above listed cases, and will fully cooperate with the Board in an effort to arrive at a fair and reasonable agreement. Nevertheless, as I said at our opening session, I would not want this willingness to be construed as an abandonment of our legal position respecting the demands of the parties and the crew consist negotiations that stem therefrom. Briefly, we have believed from the outset, and continue to believe, that these demands and the negotiations that spring from them are appropriate only for national handling. Moreover, we do not believe that to date the UTU or its predecessor organization, the BRT, have bargained in such fashion as to discharge their obligations under Section 2, First of the Act.

We are aware that it is not the function of the Board to pass upon questions of this sort. I simply want to avoid any possible misunderstanding and to assure you that, notwithstanding our views respecting the requirements of the

Act and without abandoning our rights in any respect, we will make every effort to dispose of this dispute during the mediation sessions.

Very truly yours,
/s/ J. R. Wolfe

CC: Mr. T. A. Tracy
Executive Secretary
National Mediation Board
Washington, D.C. 20572

[DEFENDANT'S EXHIBIT 7]

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

October 16, 1969
Case No. A-7524 Sub 1

Mr. J. R. Wolfe
Vice President-Labor Relations
Chicago & North Western Railway Company
400 West Madison Street
Chicago, Illinois 60606

Mr. Charles Luna, President
United Transportation Union
15401 Detroit Avenue
Cleveland, Ohio 44107

Gentlemen:

We have been advised by Mr. Charles Luna, President, United Transportation Union, in answer to our letter addressed jointly to your respective carrier and organization, under date of October 8, 1969, that the organization has declined, in writing, to arbitrate the question in our Case No. A-7524 Sub 1, as set forth in our letter of March 16, 1966.

Your attention is therefore directed to the last clause in Section 5, First (b) of the Railway Labor Act, as amended, reading as follows:

> "If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

It is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement.

In these circumstances, notice is hereby served in behalf of the Board that its services (except as provided in Section 5, Third, and Section 10 of the law) have this day been terminated under the provisions of the Railway Labor Act.

We are sending to Mr. Wolfe a copy of Mr. Luna's letter dated October 13, 1969.

By order of the NATIONAL MEDIATION BOARD.

/s/ Thomas A. Tracy
Executive Secretary

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 69 C 2401

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation, *Plaintiff*,

v.

UNITED TRANSPORTATION UNION, a voluntary, unincorporated labor association, *Defendant*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on to be heard on plaintiff's verified complaint as amended; defendant's motion to vacate the temporary restraining order; plaintiff's motion for preliminary injunction and defendant's motion to dismiss; the first and second defenses in defendant's verified answer and, the Court having heard the evidence, considered the briefs of the parties and heard the arguments of counsel with respect thereto, and being fully advised in the premises, makes the following findings of fact and conclusions of law:

1) Plaintiff is now and was at all times herein mentioned a corporation, as were and are other railroads with which it has merged and which it controls, and is engaged in the business of transporting persons and property by rail in interstate commerce in the Eastern Division of the Northern Judicial District of Illinois and elsewhere in the State of Illinois and other states of the United States and is a "carrier" within the meaning of and subject to the Railway Labor Act, 45 USC 151 *et seq.*

2) Defendant is a voluntary, unincorporated labor association, the successor to the Brotherhood of Railroad Trainmen, the Switchmen's Union of North America and

other voluntary, unincorporated labor associations and is, as were its predecessors the "representative" under the Railway Labor Act, *supra*, of employees of plaintiff and the corporations with which it has merged and which it controls, hereinafter "Defendant" and is engaged in business as such "representative" in the Eastern Division of the Northern Judicial District of Illinois and elsewhere in the State of Illinois and other states of the United States.

3) The jurisdiction of the Court is invoked by plaintiff under 45 USC §§ 1331 and 1337 as an action arising under the constitution and laws of the United States in which the amount in controversy exceeds $10,000.00 exclusive of interest and costs and as an action under the Railway Labor Act, 45 USC 151 *et seq.*, an Act of Congress regulating commerce, particularly Section 2 First, 45 USC 152 First, thereof.

4) Plaintiff seeks an injunction against a strike and picketing of plaintiff by defendant over a dispute between plaintiff and defendant with respect to whether plaintiff shall have the unrestricted right to determine number and craft of persons to be employed in crews in trains and yard service or whether a specified minimum number of persons shall be employed in such crews; the ground for plaintiff's action is that defendant has not complied with Section 2 First, of the Railway Labor Act, *supra*, which provides that it shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

5) Defendant denies that Section 2 First of the Railway Labor Act is justiciable and denies that the Court has

jurisdiction under the Norris-LaGuardia Act, 29 USC 101, *et seq.*, particularly Sections 4, 7 and 8 thereof, to issue the injunction sought by plaintiff; the requirements of the Railway Labor Act with respect to the dispute between plaintiff and defendant having been exhausted.

6) In July 1965, defendant served a notice on plaintiff and at about the same time on other railroads, under the provisions of Section 6 of the Railway Labor Act, 45 USC 156 of its desire for a collective agreement with plaintiff to be effective January 25, 1966 at the expiration of the Award of Arbitration Board No. 282 which had been established under and in pursuance of Public Law 88-108, 45 USC 157 (1969 Supp.) for a specified minimum number of persons to be employed by plaintiff in crews in train and yard service.

7. Plaintiff, like other railroads on which defendant served the aforementioned notice, refused to negotiate with defendant with respect thereto on the ground it was not required by the Railway Labor Act to do so because the notices were served during the effective period of the Award of Arbitration Board No. 282. Whereupon, defendant requested the National Mediation Board to assume jurisdiction of the dispute arising from such notice and the National Mediation Board did assume jurisdiction thereof in October 1965.

8. In December 1965 plaintiff, as did other railroads, served a notice on defendant under the provisions of Section 6 of the Railway Labor Act, 45 USC 156 of its desire for a collective agreement with plaintiff for the railroad to have the unrestricted right to determine the number and the craft of persons to be employed in crews in train and yard service and further proposed that such notice be handled concurrently with the notice theretofore served on it by defendant in July 1965 and that, if no agreement should be reached by plaintiff and defendant with respect to such notices, the dispute arising therefrom be further

handled under the Railway Labor Act in conjunction and concurrently with disputes between defendant and other railroads arising from similar notices served at about the same time. Such notice was served and such proposals were made by plaintiff and by other railroads expressly subject to the position that it was not required by the Railway Labor Act to negotiate with defendant with respect to the notice served by defendant on plaintiff in July 1965.

9. In January 1966, plaintiff and defendant met with respect to the notice and proposals served in December 1965 by plaintiff upon defendant. No agreement was made. Defendant refused to negotiate concurrently with plaintiff with respect to the notice served by defendant on plaintiff in July 1965. Defendant further refused to negotiate both of said notices in conjunction each with the other or with disputes between defendant and other railroads arising from similar notices served at about the same time. Plaintiff refused to negotiate with defendant independently of similar disputes between defendant and other railroads.

10. Thereafter plaintiff requested the National Mediation Board to, and it did, assume jurisdiction of plaintiff's dispute with defendant arising from the notice served by plaintiff on defendant in December 1965, as did other railroads, with respect to disputes between them and defendant arising from similar notices served by them on defendant in December 1965.

11. From time to time from January 1966 until June 1969, plaintiff and defendant conferred with respect to the dispute arising from the aforementioned notices served by and upon plaintiff and defendant in 1965 but made no agreement settling the dispute.

12. On October 16, 1969, after a proffer by the National Mediation Board to the parties to submit the dispute arising from their aforementioned notices to arbitration was accepted by plaintiff but declined by defendant, the Na-

tional Mediation Board notified the parties that "it is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement", and terminated its jurisdiction of the aforementioned dispute between plaintiff and defendant effective that date.

13. The President of the United States has not established an emergency board to investigate the dispute between the parties hereto arising from their respective 1965 notices heretofore mentioned.

14. The evidence shows that at all times the defendant has taken the position that the only agreement that could be reached was and is that reached by nearly all of the railroads in the United States with defendant, which requires a restoration of approximately 95% of all of the jobs in question.

15. The court does not find as a matter of fact that either of the parties have been guilty of bad faith in bargaining but finds the question of good faith is delegated to the National Mediation Board and has been resolved and is not an issue before this court.

Conclusions of Law

1. This action arises out of and involves a labor dispute within the meaning of the Norris-LaGuardia Act, 29 USC Section 101, *et seq.*

2. Whether there has been compliance with Section 2 First of the Railway Labor Act, 45 USC 152 First, providing that it shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to com-

merce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof is a matter for administrative determination and has been determined by the National Mediation Board under the provisions of Sections 5 and 6 of the Railway Labor Act, 45 USC 155, 156, is not justiciable and this Court does not have jurisdiction to consider or adjudicate disputes with respect to compliance with such subsection, particularly after the National Mediation Board has relinquished its mediatory jurisdiction of a dispute as in this case.

3. The requirements of the Railway Labor Act having been exhausted for more than thirty days with respect to the dispute between plaintiff and defendant arising from the notices served by defendant on plaintiff in July 1965 and by plaintiff on defendant in December 1965 with respect to the number and craft of persons to be employed by plaintiff in its train and yard crews, the Court did not and does not have jurisdiction under the provisions of Sections 4 and 7 of the Norris-LaGuardia Act, 29 USC 104, 107, to issue an injunction, either temporary or permanent against defendant striking and picketing plaintiff as sought by plaintiff herein.

4. Defendant is entitled to receive from plaintiff recompense for loss, expense or damage sustained by defendant as a result of the issuance of the temporary restraining order on November 19, 1969 including all reasonable costs in the defense of such order and in opposing the injunction sought by plaintiff in this proceeding.

5. Defendant's motion to vacate the temporary restraining order heretofore issued should be denied as the question is moot; plaintiff's motion for preliminary injunction should be denied; defendant's motion to dismiss plaintiff's complaint should be allowed, and an appropriate decree should be entered for such purposes.

FINAL DECREE

This cause coming on to be heard on the verified complaint of the plaintiff filed herein on November 20, 1969 as amended; on plaintiff's motion for a preliminary injunction; on defendant's motion filed November 21, 1969 to vacate the temporary restraining order issued herein on November 19, 1969 which was once extended by an order of the Court and thereafter by agreement of the parties until 6:00 p.m., December 12, 1969 and on plaintiff's motion for a preliminary injunction and defendant's motion to dismiss which are part of defendant's verified answer filed herein on December 2, 1969, and

The Court having heard and considered the testimony and written evidence offered by plaintiff in support of its motion for a preliminary injunction and by defendant in opposition thereto and in support of its motions to vacate the temporary restraining order, and to dismiss the complaint and action on December 2, 3, 4 and 5, 1969 and having heard and considered the briefs submitted by and the arguments of counsel and

The Court having tried the action upon the facts without a jury and having heretofore specially found the facts and separably stated its conclusions of law thereon and having directed the entry of an appropriable [sic] decree, it is

ORDERED, ADJUDGED and DECREED that:

1. Defendant's motion to vacate the temporary restraining order issued November 19, 1969 against a strike by defendant is denied, the question now being moot.

2. Plaintiff's motion for preliminary injunction is denied.

3. The plaintiff shall recompense, and pay to, the defendants herein their loss, expense, or damage caused to the defendants by the issuance of the Temporary Restraining Order herein on November 19, 1969 including all reasonable costs and expense of defense against the order

and against the granting of injunctive relief sought in this proceeding and subsequently denied by this Court. For the purpose of determining the amount thereof, this Court reserves jurisdiction of this cause for this purpose only. Hearing thereon will be set upon motion when time for appeal has passed. If appeal is taken, hearing will be set after final mandate herein.

4. Subject to the jurisdiction reserved in the preceding paragraph, defendant's motion to dismiss the complaint is allowed and the complaint and this action is dismissed at plaintiff's cost.

ENTER:

/s/ J. S. PERRY
United States District Judge

Dated: Chicago, Illinois,
December 11, 1969.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Caption omitted in printing]

Friday, December 19, 1969

ORDER

This matter comes before the court on the emergency motion of defendant-appellant Union to vacate the district court's order granting an injunction pending appeal.

A suit was brought by the plaintiff in the District Court for the Northern District of Illinois, Eastern Division, for an injunction against defendant Union from engaging in a strike against plaintiff Railroad over a labor dispute which arose under the Railway Labor Act concerning the composition of various train crews. Plaintiff alleged that defendant Union had not exercised every reasonable effort to settle the dispute pursuant to 45 U.S.C. § 152 of the Railway Act and consequently, an injunction should issue.

The district court decided that the question of "reasonable effort" contained in § 2 was non-justiciable and denied plaintiff's plea for an injunction. The district court, however, granted an injunction pending appeal, being of the opinion that a strike by the Union would moot the appeal and cause irreparable harm to plaintiff and the public. Being fully advised and after careful consideration,

IT IS ORDERED that the emergency motion to vacate forthwith the restraining order pending appeal be taken with the case;

IT IS FURTHER ORDERED that the hearing of the appeal of the defendant Union to vacate the injunction pending appeal and the appeal of the plaintiff Railway from the denial of an injunction below will be accelerated, and that plaintiff may serve and file an additional brief, covering its appeal as well as defendant's on or before December 29.

1969; defendant may serve and file an additional brief, covering both appeals, on or before January 5, 1970:

IT IS FURTHER ORDERED that both appeals be set for oral argument on the afternoon of January 7, 1970, at 2:00 p.m.; printed briefs will not be required and appendices will be dispensed with.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969—JANUARY SESSION, 1970

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 18109

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Plaintiff-Appellant,

v.

UNITED TRANSPORTATION UNION, *Defendant-Appellee.*

No. 18145

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Plaintiff-Appellee,

v.

UNITED TRANSPORTATION UNION, *Defendant-Appellant.*

MARCH 6, 1970

Before SWYGERT, *Chief Judge,* FAIRCHILD and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* This opinion contains our decision in two appeals. No. 18145 is the appeal of the Chicago and North Western Railway Company (Railway) from the district court's finding that § 2, First,[1] of the

[1] 45 U.S.C. § 152, First, provides:

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Railway Labor Act (45 U.S.C. § 152, First) requiring the parties to exert "every reasonable effort" to settle their disputes was not a requirement which anticipated judicial enforcement. Consequently, since the district court found that it did not have jurisdiction to decide whether § 2, First, was complied with, and all other procedures of the Railway Labor Act having been exhausted, the district court held that the Norris-LaGuardia Act [2] prohibited the enjoining of a threatened strike by the United Transportation Union (Union). The district court, however, granted an injunction against the threatened Union strike pending an appeal of its decision of the justiciability of § 2, First, and the correctness of the court's order granting the injunction pending appeal is the subject of the second appeal, No. 18109, in which the Union is the appellant. We affirm the decision of the district court in both appeals.

The factual basis of the two appeals arose out of a dispute between the United Transportation Union and the Chicago North Western Railway Company over the question of how many brakemen should be employed on the Railway's trains. Such a dispute is commonly known as a crew consist controversy. The dispute was initiated in July of 1965 by service by the Union upon the Railway of notices pursuant to § 6 of the Railway Labor Act (Act)

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[2] Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) provides in relevant part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> * * * * *

(45 U.S.C. § 156)[3] requesting a change in agreements to require that not less than two brakemen be employed on every freight and yard crew. In response, the Railway in December of 1965 served notices requesting an agreement that the existing rules respecting minimum crews be rescinded and the matter of crew size be committed to the judgment of management.[4]

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[3] Section 6 (45 U.S.C. § 156) provides:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

[4] While the historical background of the litigation involved in crew consist controversies is not directly relevant, a brief discussion of the more recent developments in this area may be helpful for a more meaningful grasp of the problems.

The dispute over the number of brakemen to be employed began to be discussed in 1959 when most of the nation's railroads served notices upon various unions under § 6 of the Act proposing rules that would permit, in the discretion of management, the elimination of firemen and reduction in the number of brakemen. The unions countered in 1960 by serving uniform notices proposing a national rule requiring a minimum of two brakemen on every crew.

The issues were joined and negotiated on an industry-wide basis and were not resolved until in the face of a threatened nationwide

By November of 1969, the parties had held conferences pursuant to § 6 (45 U.S.C. § 156);[5] the National Mediation Board had mediated the dispute after invocation of mediation pursuant to § 5 (45 U.S.C. § 155);[6] the Board, pur-

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strike the Congress enacted a compulsory arbitration statute. (77 Stat. 132).

Under the arbitration prescribed by the Congress in 1963, Arbitration Board No. 282 established a national procedure for resolving the "crew consist" issue over the number of brakemen on train crews. The parties were directed to conduct local negotiations on each carrier, and, in the event of failure of agreement, to conduct local arbitration, all pursuant to national guidelines respecting questions of work burden and safety.

The arbitration award expired in January of 1966. The United Transportation Union served notices upon more than eighty railroads pursuant to § 6, proposing restoration of the crew of one conductor and two brakemen. The railroads responded with a request for an agreement permitting crew reductions beyond those authorized under the award of Arbitration Board No. 282.

[5] See footnote 3, *supra*.

[6] Section 5 First and Second (45 U.S.C. § 155 First and Second) provide:

> First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:
>
> (a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.
>
> (b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.
>
> The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.
>
> In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this

suant to § 5, had concluded that its efforts had been unsuccessful and had proffered arbitration; the Railway had accepted that proffer but the Union declined; the Board thereupon, on October 16, 1969, had terminated its services pursuant to § 5. The President had not appointed an Emergency Board under § 10 (45 U.S.C. § 160),[7] and the

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title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

[7] 45 U.S.C. § 160 provides:

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the

§ 5 thirty day "cooling off" period respecting maintenance of the status quo had expired.

At the end of November, the Railway instituted a lawsuit in the district court asking the court to declare that the procedures of the Railway Labor Act had not been exhausted and to enjoin the Union from exercising self-help in the form of strike. The Railway alleged that the Union had not discharged all its obligations under the Railway Labor Act in that it had not complied with § 2, First, which imposes upon the parties the "duty to exert every reasonable effort" to settle their disputes. At the same time the Railway filed its complaint it moved for a temporary restraining order which the court granted.

The Railway then presented evidence to show that the Union had violated § 2, First, by not bargaining in good faith. At the conclusion of the Railway's case, the court granted defendant Union's motion to dismiss the complaint and dissolved the temporary restraining order on the basis that:

> § 2, First, . . . is a matter for administrative determination and has been determined by the National Mediation Board under the provisions of Sections 5 and 6 of the Railway Labor Act, 45 U.S.C. 155, 156, is not justiciable and this Court does not have

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dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

jurisdiction to consider or adjudicate disputes with respect to compliance with such subsection, particularly after the National Mediation Board has relinquished its mediatory jurisdiction of a dispute as in this case.

The district court, however, recognizing that there was case law contrary to its decision, that a strike would result in a mooting of the appeal, and that "such a strike would irreparably injure the plaintiff and the public," granted plaintiff Railway's motion for an injunction pending appeal.

Three days after the district court's decision, the Union filed an emergency motion in this court to vacate the injunction pending appeal. This court issued an order directing that the Union's motion to vacate the injunction pending appeal be taken with the Railway's appeal from the district court's denial of an injunction below. The order also directed that the appeals be expedited. (See *Chicago and North Western Railway Company* v. *United Transportation Union*, No. 18109 unpublished order, 7th Cir. Dec. 19, 1969.)

By ordering that the Union's motion to vacate the injunction pending appeal be taken with the expedited appeal from the district court's denial of a preliminary injunction, we in effect upheld the granting of the injunction pending appeal. Our order of December 19, 1969, in that respect is inconsistent with this court's decision in *Elgin J. & E. Ry. Co.* v. *Brotherhood of Railroad Trainmen*, 302 F. 2d 545 (7th Cir. 1962), which held that if the Norris-LaGuardia Act prohibits the granting of an injunction below it also prohibits the granting of an injunction pending appeal. We are no longer of the opinion that the *Elgin* case is the correct interpretation of the Norris-LaGuardia Act as it applies to injunctions pending appeal and overrule our decision in *Elgin*. While it may be argued that our decision upholding the district court's denial of a preliminary in-

junction because of the non-justiciability of § 2, First, (see pp. 985-999 *infra*) moots the question of whether the district court erred in granting an injunction pending appeal, the necessity of an explanation of our inconsistent action in our December 19, 1969, order maintaining the injunction pending an expedited appeal and the realization that the continued adherence to an incorrect opinion could cause irreparable harm for many years before the case comes before this court in a technically correct posture, persuades us that the question is not moot but should at this time be decided.

We hold that the Norris-LaGuardia Act does not prohibit the district court from granting an injunction pending appeal even though the court determines that Norris-LaGuardia prohibits an injunction below. The power of a district court to grant an injunction to maintain the status quo pending appeal was first codified by the "All Writs Act" contained in the Judiciary Act of 1789, 28 U.S.C. § 1651. In *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S. 4, 62 S. Ct. 875, 86 L.Ed. 1229 (1942), the Supreme Court in upholding this power stated:

> It has always been held, therefore, that as a part of its traditional equipment for the administration of justice, a federal court can stay enforcement of a judgment pending the outcome of an appeal.
> *Id.* at 9-10, 62 S.Ct. at 881.

See also Hovey v. McDonald, 109 U.S. 150, 161, 3 S. Ct. 136, 27 L.Ed. 888 (1883). Absent the prohibitions of the Norris-LaGuardia Act, the law is established that even if a district court determines it lacks jurisdiction to grant an injunction pending appeal, it has the power to preserve appellate review of its determination that it lacked jurisdiction. *See United States v. Shipp*, 203 U.S. 563, 573, 27 S. Ct. 165, 51 L.Ed. 319 (1906); *see also Peltway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1002-3 (5th Cir. 1969); *Eastern Greyhound Lines v. Fusco*, 310 F.2d 632, 634 (6th Cir. 1962).

In the instant case as in this court's earlier opinion in the *Elgin* case, the injunction pending appeal was issued pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.[8] The Rule itself is not a jurisdictional grant but merely a codification of a district court's power to maintain the status quo pending appeal. In *Elgin*, the court relied on Rule 82 of the Federal Rules of Civil Procedure[9] which provides that the promulgation of the Federal Rules does not expand the district court's jurisdiction, and Rule 65(e)[10] which provides that the Federal Rules "do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee." The *Elgin* court construed Rules 82 and 65(e) as denying the power of the district court to grant an injunction pending appeal pursuant to 62(c) in cases where the Norris-LaGuardia Act

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[8] Rule 62(c) of the Federal Rules of Civil Procedure provides in relevant part:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

[9] Rule 82 provides in relevant part:

> These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

[10] Rule 65(e) provides:

> These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C. § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C. § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

prohibited the granting of an injunction in the district court. The *Elgin* court's application of the three Federal Rules of Civil Procedure is correct only if we begin with the premise that Congress by enacting the Norris-LaGuardia Act intended to limit in labor disputes the inherent power of district courts under the "All Writs Act" to grant injunctions pending appeal. If the Congress did not intend such a limitation on the district court's power, Rule 62(c) can be applied without any conflict with the dictates of Rule 82 and Rule 65(c).

There is nothing in the text of the Norris-LaGuardia Act or in the legislative history surrounding the drafting and enactment of the Act indicating a Congressional intent to remove from the district courts their long-recognized power to grant injunctions pending appeal. To remove from the district courts the power to grant injunctions pending appeal and thus the power to maintain the status quo in all cases where the district court has decided that the Norris-LaGuardia Act prohibited an injunction is to in effect make the district court the court of last resort on these matters regardless of the difficulty or novelty of the issues involved. In the absence of any specific Congressional intention to remove the power of district courts to grant injunctions pending appeal, we decline to read into the Act such a serious limitation into the judicial review process.

The United States Supreme Court in *United States* v. *United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947) supports our decision. The question before the district court in United Mine Workers involved the applicability of the Norris-LaGuardia Act so as to bar the United States from securing an injunction against a strike by United Mine Workers. The district court granted a temporary restraining order which the Union did not obey and the district court found the Union officers to be in contempt. The Supreme Court affirmed the judgment of contempt, finding the Nor-

ris-LaGuardia Act inapplicable. The Court went on to hold, however, that even if Norris-LaGuardia applied, the district court still had the power to preserve the status quo while it decided the underlying jurisdictional issue posed by Norris-LaGuardia:

> In these circumstances, the District Court unquestionably had the power to issue a restraining order for the purposes of preserving existing conditions pending a decision upon its own jurisdiction. 330 U.S. at 290, 67 S. Ct. at 695.

While it is true that *United Mine Workers* involved a temporary restraining order and not as the case at bar an injunction pending appeal, both cases deal with difficult questions of jurisdiction. We read the Supreme Court's holding in *United Mine Workers*, that despite the prohibitions of Norris-LaGuardia the district court has inherent injunctive power to grant a temporary restraining order to preserve the status quo while deciding difficult or novel questions determining its own jurisdiction, as support for the proposition that the district court, despite Norris-LaGuardia, also has the inherent power to grant an injunction pending a review of its determination of these jurisdictional issues.

The reasoning of Justice Frankfurter in his concurring opinion in *United Mine Workers* would seem to accept our analysis and its extension to this case. Although Justice Frankfurter was of the opinion that the Norris-LaGuardia Act prohibited permanent injunctive relief in the factual situation, he concurred in the majority's result on the basis that the Norris-LaGuardia Act did not bar interim injunctive relief necessary to preserve the status quo while the court decided the jurisdictional question and while that district court jurisdictional determination was being reviewed by the appellate court:

> To suggest that the right to determine so complicated and novel an issue could not be brought within the

> cognizance of the district court, *and eventually of this court,* is to deny the place of the judiciary in our scheme of government. 330 U.S. at 310, 67 S.Ct. at 704 [emphasis supplied].

Although this issue has not been discussed in depth by other courts of appeals, the circuits which have been faced with the problem of district court injunctions pending appeal in a labor dispute have acted consistently with our decision in this appeal. See *Missouri-Kansas-Texas RR. Co.* v. *Brotherhood of Railroad Trainmen,* 342 F. 2d 298 (5th Cir. 1965); *Texas and N.O. RR. Co.* v. *Brotherhood of Railroad Trainmen,* 307 F. 2d 151, 153, 163 (5th Cir. 1962); *Pan-American World Airways* v. *United Brotherhood of Carpenters,* 324 F. 2d 217 (9th Cir. 1963); the district court, though denying a preliminary injunction, granted a 10-day stay to preserve the status quo pending appeal to the Court of Appeals); *Norfolk & P.B.L. RR. Co.* v. *Brotherhood of Railroad Trainmen,* 248 F. 2d 34 (4th Cir. 1957; the district court ordered the temporary injunction dissolved, though by supplemental order, the execution of the court's judgment was suspended pending appeal by the carrier).

While we are cognizant of the purposes of the Norris-LaGuardia Act to remove the injunctive power of the judiciary from the field of labor disputes, we are also mindful of the necessity of judicial review to our legal system. In the absence of a specific Congressional directive, we strike the balance in favor of maintaining the status quo to allow time for a meaningful judicial review.[11, 11a]

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[11] We also reject the appellant Union's contention that the district court abused its discretion in granting the injunction pending appeal. We find no such abuse. Nor do we find the form of the injunction issued pending appeal improper.

[11a] Since this opinion overrules *Elgin J. & E. Ry. Co.* v. *Brotherhood of Railroad Trainmen,* 302 F. 2d 545 (7th Cir. 1962), we have circulated it to the full active court. No judge has requested a hearing *en banc.*

We now come to the Railroad's appeal in No. 18145 from the decision of the court below that § 2, First, of the Railway Labor Act (45 U.S.C. § 152) is non-justiciable. We are of the opinion that § 2, First, does not contemplate judicial enforcement of its "reasonable effort" requirement and, therefore, affirm the decision of the district court judge.

We construe § 2, First, as a statement of the purpose and policy of the subsequent provisions of the Act and not as a specific requirement anticipating judicial enforcement.

> Nor does § 2 Second make justiciable what otherwise is not. . . . But § 2, Second like § 2, First merely states the policy which those other provisions buttress with more particularized commands. *General Committee of Adjustment of Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Company*, 320 U.S. 323, 334, 64 S. Ct. 146, 88 L.Ed. 76 (1943).

To imply judicial enforcement to § 2, First, would insert a judicial inquiry into every step of the Railway Labor procedures to determine in each case if reasonable effort is being exerted; this is a role which we believe Congress did not intend the courts play in the settlement of Railway disputes.

In *General Committee* v. *M.-K.-T. RR. Co.*, *supra*, the Supreme Court in deciding certain questions of representation under the Railway Labor Act were not justiciable stated:

> In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery

and involved the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow, it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. *The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.*

Id. at 332-333, 64 S.Ct. at 150-151. [emphasis supplied].

Later in its opinion the Court reiterated:

[T]he conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the selective list of problems which it was ready to place in the adjudicatory channel. All else is left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability. *Id.* at 337, 64 S. Ct. at 152.

We believe that § 2, First, was intended to play an integral part in facilitating the other more specific procedures of the Railway Act: "The heart of the Railway Labor Act is the duty, imposed by § 2 First upon management and labor. . . ." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377, 89 S.Ct. 1109, 1115, 22 L.Ed. 2d 344 (1969). However, we find that the role of determining whether "reasonable effort" is being practiced by the parties is not a judicial one but a role which should be left to the National Mediation Board.

Under the procedures of the Act, the National Mediation Board plays the dominant role in major disputes within the framework of the Act. Section 6 of the Act provides:

[I]n every case . . . where the services of the Mediation Board have been requested by either party or

> said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by § 5 of this Act, by the Mediation Board.

Section 5 provides in pertinent part that after the services of the Board are invoked or proffered:

> [S]aid Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.
>
> If arbitration at the request by one or both parties shall be refused, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under § 10 of this Act, no change shall be made in the rates of pay, rules or working conditions or established practices in effect prior to the time the dispute arose.

Thus it can be seen that the Mediation Board plays a pivotal role in the workings of the Act. It maintains the status quo, attempts to bring about a voluntary settlement between the parties, tries to induce the parties to submit to arbitration after a determination that voluntary settlement cannot be reached, and then in effect, if § 10 and the Emergency Board are not appropriate, the Mediation Board after a thirty-day period releases its hold on the status quo.

We believe this integral role of the Mediation Board requires it and not the judiciary to enforce compliance with § 2, First. The Mediation Board is certainly better qualified to determine if the parties are exercising reasonable effort in settling their dispute. If the Mediation Board is of the opinion that one of the parties is not negotiating in good faith, it may simply retain jurisdiction over the mediation process until it believes good faith is being exercised. The Act provides that while the Board retains jurisdiction the parties must maintain the status quo. The Board can refuse to certify that "its mediatory efforts have failed" and thus prevent the exercise of self-help until it is satisfied that its mediatory efforts had a chance to fail, *i.e.*, that the parties were bargaining in good faith. Mediation cannot fail if it never had a chance to succeed.[12]

Instead of involving the federal courts in the determination of whether a reasonable effort had been exercised, after all the procedures of the Act have been completed, it seems much more efficient and sensible to allow the Mediation Board while the Act's procedures are being carried out to determine if a reasonable effort is being exercised by the parties. To allow the Mediation Board rather than the courts to perform this function removes the courts from having to issue injunctions in labor disputes (because § 2, First, had not been complied with), thus avoiding conflict with the dictates and policy of the Norris-LaGuardia Act. In addition, a judicial enforcement of § 2, First, would also require the federal courts to remand the dispute back to a certain stage in the procedures of the Act where one party was not bargaining in good faith. We find no ma-

[12] Of course, if one party is not negotiating in good faith as a dilatory tactic to prevent the other party from eventually exercising self-help, the Board can decide to release jurisdiction of the dispute and allow the procedures of the Act to be exhausted in order to allow for self-help.

chinery nor guidelines in the Act which would aid the court in making this difficult determination.

We are mindful that the role of the Mediation Board is basically a non-adjudicatory one, *see e.g., Detroit & Toledo Shore Line Railroad Company* v. *United Transportation Union*, 396 U.S. 142, 90 S.Ct. 294, 24 L.Ed. 2d 325 (Dec. 9, 1969). However, we recognize that for the procedures of the Act to be effective, the Mediation Board must accept in certain instances a limited "quasi adjudicatory" posture. Certainly the authority conferred on the Board pursuant to § 2, Ninth [13] (45 U.S.C. § 152, Ninth), to determine the

[13] 45 U.S.C. § 152, Ninth, provides:

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

proper representatives of the employees can be considered adjudicatory or quasi adjudicatory in nature. Similarly, we interpret § 2, First, to confer on the Board pursuant to its express mediatory power, the power, whether it may be considered adjudicatory or quasi adjudicatory, to make sure the parties are exercising every reasonable effort. We do not feel this limited power under § 2, First, will significantly impair the Board's impartial job as a mediator.

We find that the expertise, proximity to the negotiation process and power to maintain the status quo of the Mediation Board make it singularly well suited to implement the Congressional intent and purpose behind the inclusion of § 2, First. While we agree that the procedures of the Act are purposely long and drawn out in order for the parties to reach agreement and prevent invocation of self-help, we are of the opinion that the tacking on of judicial review after a completion of the Act's procedures does nothing but involve courts in intricate factual questions of intent while unreasonably postponing the parties' right to self-help.

The Railway places great reliance that § 2, First, is justiciable upon the Supreme Court's decision in *Virginia Ry. v. System Federation*, 300 U.S. 515, 57 S.Ct. 592, 81 L. Ed. 789 (1937). In *Virginia Ry.*, the railroad had refused to engage in collective bargaining with the Federation after the National Mediation Board, acting under § 2, Ninth, of the Railway Act, determined and certified the Federation to be the representative of the shop craft employees for collective bargaining with the railroad. The Supreme Court upheld a district court injunction which required the railroad to recognize and bargain with the Federation despite the railroad's argument that § 2, Ninth, was not justiciable. While the injunction also required the railroad to make every reasonable effort to settle disputes with the Federation thus

in fact invoking the dictates of § 2, First, the opinion did not state nor imply that whether reasonable effort is in fact complied with by either party was a question for the courts to answer. The Supreme Court did not suggest that the district court retain jurisdiction to determine if the parties were negotiating in good faith, nor did it suggest a further judicial proceeding if conferences between the railway company and the Federation failed. Thus while *Virginia Ry.* holds that § 2, Ninth, contemplates judicial enforcement of the requirement to bargain with the Board's accredited employee representative, it does not hold that judicial enforcement is available to determine whether the parties are in fact negotiating in good faith. As we read *Virginia Ry.*, it allows for judicial enforcement of the specific dictates of § 2, Ninth, and simply provides that when the carrier and the employees' representatives are negotiating they should be guided by the other provisions of the Railway Labor Act including § 2, First.

In addition, to *Virginia Ry.*, the railway also relies on a recent decision by the Fourth Circuit in *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n Int'l*, 416 F. 2d 633 (4th Cir. 1969) (petition for cert. filed, 396 U.S.___, 90 S.Ct. 924, 25 L.Ed. 2d ___), in which the court upheld a district court injunction against a threatened strike. The court in a holding opposite to our conclusions found:

> Restraining the parties from self-help through strikes or otherwise, until they have complied with the duty to bargain in good faith vindicates the Congressional purpose of providing machinery to prevent strikes without creating an irreconcilable conflict with the Norris-LaGuardia Act. *Id.* at 636.

and thus held § 2, First, to be justiciable. We cannot agree with the Fourth Circuit decision. The machinery to prevent strikes which was the Congressional purpose in enact-

ing the Railway Labor Act is contained within the procedures of the Act and not outside it in the injunctive power of the federal courts. We believe that the provisions of the Act and the powers of the National Mediation Board can enforce the duty to bargain in good faith without the need of judicial interference.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Friday, March 6, 1970

Before: HON. LUTHER M. SWYGERT, *Chief Judge*, HON. THOMAS E. FAIRCHILD, *Circuit Judge*, HON. OTTO KERNER, *Circuit Judge*.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 18109, 18145

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, *Plaintiff-Appellee, (Cross-Appellant)*,

v.

UNITED TRANSPORTATION UNION, *Defendant-Appellant, (Cross Appellee)*.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the decision of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that there be no recovery of costs between the parties to these appeals.

Supreme Court of the United States

No. 189 ----- , *October Term, 19* 70

Chicago and North Western Railway Company,

Petitioner,

v.

United Transportation Union

ORDER ALLOWING CERTIORARI. Filed October 12, 1970.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

FILE COPY

FILED

MAY 26 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1616~~ 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on March 6, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals is set forth in Appendix A hereto (pp. 1a-20a *infra*), and the findings of fact, conclusions of law, and judgment of the District Court in Appendix C (pp. 22a-29a *infra*).

The decision of the District Court is not reported, but the Court of Appeals opinion is officially reported at 422 F.2d 979.

JURISDICTION

The judgment of the Court of Appeals, set forth in Appendix B hereto (p. 21a *infra*), was entered on March 6, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

In this case, petitioner railroad sought an injunction against a strike by respondent union on the ground that, during the negotiations between the parties, the union had not complied with Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First), which requires carriers and unions "to exert every reasonable effort to make and maintain agreements." The question presented in this petition is whether the federal courts have jurisdiction to entertain such a claim, or whether instead such jurisdiction is committed by the Act exclusively to the National Mediation Board.

STATUTORY PROVISIONS INVOLVED

The statutory provisions principally involved are Sections 2 First and 5 First of the Railway Labor Act, which provide as follows:

Section 2 First (45 U.S.C. § 152 First):

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to

the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 5 First (45 U.S.C. § 155 First):

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change

shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

STATEMENT

This case arose when petitioner, the Chicago & North Western Railway Company (hereinafter the "C&NW"), sued to obtain an injunction against a strike threatened by respondent, the United Transportation Union (hereinafter the "UTU"). The basis for the C&NW's suit was its claim that the UTU had not complied with the command of Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First) to "exert every reasonable effort" to resolve its dispute with the C&NW. Neither the District Court nor the Court of Appeals reached the merits of the C&NW's claim, for both held that violations of Section 2 First are remediable exclusively by the National Mediation Board and that therefore the C&NW's claim fell outside the jurisdiction of the federal courts. The sole issue presented in this petition is whether that holding is correct. The relevant facts are as follows:

The labor dispute between the C&NW and the UTU that led to the strike threat, and hence to the litigation, concerns how many brakemen should be employed on the C&NW's trains—the so-called "crew consist" controversy. In 1965 the C&NW and UTU exchanged bargaining notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) proposing changes in their existing agreements on that subject. The formal procedures of the Railway Labor Act were exhausted with respect to these notices on November 16, 1969. That is, by that date:

> "... the parties had held conferences pursuant to § 6 (45 U.S.C. § 156); the National Mediation

Board had mediated the dispute after invocation of mediation pursuant to § 5 (45 U.S.C. § 155); the Board, pursuant to § 5, had concluded that its efforts had been unsuccessful and had proffered arbitration; the Railway had accepted that proffer but the Union declined; the Board thereupon, on October 16, 1969, had terminated its services pursuant to § 5. The President had not appointed an Emergency Board under § 10 (45 U.S.C. § 160); and the § 5 thirty day 'cooling off' period respecting maintenance of the status quo had expired." (CA Op. *infra* pp. 4a-6a, footnotes omitted).

On November 19, 1969 the C&NW instituted this suit in the United States District Court for the Northern District of Illinois seeking an injunction against a threatened strike by the UTU. The C&NW alleged that, although the formal procedures of the Act had been exhausted, the UTU had not discharged its obligations under that statute in that it had not exerted "every reasonable effort" to settle the dispute as required by Section 2 First (45 U.S.C. § 152 First) (CA Op. *infra* p. 6a). The District Court granted a temporary restraining order and then held a hearing on the C&NW's motion for a preliminary injunction at which C&NW witnesses testified at length.[1] At the conclusion of the C&NW's case, the District Court

[1] Since the character of that testimony is not relevant here, and since it is very extensive, we shall not attempt to summarize it. By way of example, however, a part of the C&NW's testimony would have supported—we think compelled—a finding that the UTU breached its statutory bargaining duties in the following respects: (1) it refused to bargain at all over the C&NW's initial proposals and subsequent compromise proposals (see *Brotherhood of Ry. Clerks* v. *Atlantic C.L. R.R.*, 201 F.2d 36, 39 (4th Cir. 1953); *United Steelworkers* v. *NLRB*, 390 F.2d 846 (D.C. Cir. 1967); *Pullman Co.* v. *Order of Ry. Conductors*, 316 F.2d 556, 563 (7th Cir. 1963); *Atlantic C.L. R.R.* v. *Brotherhood of R.R. Trainmen*,

granted the UTU's motion to dismiss on the ground that the National Mediation Board has exclusive jurisdiction to decide claims under Section 2 First (DC Conclusions 2 and 3, *infra* pp. 26a-27a). At the same time, however, "recognizing that there was case law contrary to its decision," the District Court granted the C&NW an injunction pending appeal (CA Op. *infra* p. 7a).

The C&NW appealed from the dismissal of its complaint, and the UTU appealed from the order granting the injunction pending appeal. The Court of Appeals affirmed the District Court on both counts. As to the C&NW's appeal, the Court concluded that "§ 2, First does not contemplate judicial enforcement of its 'reasonable effort' requirement." Rather, the "role of the [National] Mediation Board requires it and not the judiciary to enforce compliance with § 2, First." The Court, while noting this Court's statement in *Detroit & T. S.L. R.R.* v. *United Transportation Union*, 396 U.S. 142, 158 (1969), that "the Mediation Board has no adjudicatory authority with regard to major disputes," and saying that it was "mindful that the role of the Mediation Board is basically a nonadjudicatory one," nevertheless held that "the Mediation Board must accept . . . a limited 'quasi adjudicatory'

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262 F. Supp. 177, 183 (D. D.C.), *reversed on other grounds*, 383 F.2d 225 (D.C. Cir. 1967)); (2) it barred by convention action its negotiators from even discussing one of the C&NW's proposals (see *Piedmont Aviation, Inc.* v. *Air Lines Pilots Ass'n*, 416 F.2d 633 (4th Cir. 1969)); and (3) it adopted a "predetermined resolve not to budge from [its] initial position" (*NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 154 (1956)) and maintained from the start "an attitude of 'take-it-or-leave-it' " (*NLRB* v. *Insurance Agents Int'l Union*, 361 U.S. 477, 485 (1960)); see also *NLRB* v. *General Electric Co.*, 418 F.2d 736, 756-63 (2d Cir. 1969)).

posture" respecting Section 2 First issues. The Court acknowledged that in *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n,* 416 F.2d 633 (1969), *cert. denied,* 25 L.Ed. 2d 105 (1970), the Court of Appeals for the Fourth Circuit had rendered "a holding opposite to our conclusion," but said that it could "not agree with the Fourth Circuit decision" (CA Op. *infra* pp. 13a, 16a-17a, 19a). On the C&NW's application, the Court of Appeals stayed its mandate—thereby leaving the District Court's strike injunction pending appeal in effect—until the disposition of this petition for certiorari.

REASONS FOR GRANTING THE WRIT

The question whether Section 2 First, which this Court has referred to as the "heart" of the Railway Labor Act,[2] imposes judicially enforceable obligations is plainly important, since those obligations come into play in every negotiation conducted pursuant to the Act. So is the collateral question whether the National Mediation Board has the authority and the obligation to decide whether the parties to a negotiation have complied with Section 2 First. As to both questions, the holding of the lower court raises conflicts among decisions on a broad scale. As the lower court conceded, its decision is directly at odds with a recent decision by the Fourth Circuit Court of Appeals. While the lower court did not mention it, its decision is also in conflict with the rule established by three other Courts of Appeals. And while the lower court denied it, its decision conflicts with this Court's decision in *Virginian*

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[2] *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 377 (1969).

Ry. v. *System Federation,* 300 U.S. 515 (1937). Moreover, the lower court's decision would require the National Mediation Board to assume a responsibility that the Board has never exercised, that the Congress did not mean it to have, and that is incompatible with the performance of the Board's central statutory role as a mediatory agency.

1. As to the justiciability of Section 2 First, we begin with the conflict among lower courts rather than with this Court's holding in *Virginian* because, while the Court of Appeals thought its decision reconcilable with *Virginian,* it conceded that its decision was squarely contrary to the ruling of the Fourth Circuit Court of Appeals in *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n,* 416 F.2d 633 (1969), *cert. denied,* 25 L.Ed. 2d 105 (1970).[3]

In *Piedmont,* as in the case at bar, the dispute between the union and the carrier was a "major dispute"—that is, it was a disagreement over proposals to change existing contracts rather than a "minor" dispute over the interpretation of those contracts.[4] While "minor" disputes are subject to compulsory arbitration and may not be the occasion for strikes or lockouts,[5] such "self help" in a "major" dispute is permissible, but only when there has been compliance with all the provisions of the Railway Labor Act relating to

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[3] On May 18, 1970 this Court denied a motion for leave to file an out-of-time petition for rehearing in *Piedmont.* 38 U.S. Law Week 3454 (1970).

[4] See, generally, *Elgin, J. & E. R.R.* v. *Burley,* 325 U.S. 711, 722-28 (1945), *adhered to on rehearing,* 327 U.S. 661 (1946).

[5] See *Brotherhood of R.R. Trainmen* v. *Chicago R. & I. R.R.,* 353 U.S. 30 (1957).

such disputes.[6] In *Piedmont,* as in the case at bar, the formal procedures of the Act—conferences, mediation, and expiration of the relevant "cooling off" periods—had been exhausted, but the carrier sought a strike injunction on the ground that the requirements of the Act had not been met in that the union had failed to "exert every reasonable effort" to resolve the dispute within the meaning of Section 2 First.

The District Court in *Piedmont* granted a preliminary injunction because "the union failed to negotiate in good faith as required by the . . . Act." 416 F.2d at 637. The Court of Appeals affirmed. With respect to the enforceability of Section 2 First, as the Seventh Circuit Court of Appeals noted in the case at bar (CA Op. *infra* p. 19a), the Fourth Circuit Court of Appeals in *Piedmont* explained:

> "Restraining the parties from self-help, through strikes or otherwise, until they have complied with the duty to bargain in good faith vindicates the congressional purpose of providing machinery to prevent strikes without creating an irreconcilable conflict with the Norris-LaGuardia Act. Restraint conditioned in this respect does not deny the right to strike over a major dispute; but it delays this right until the union satisfies the mandate of the Railway Labor Act." *Id.,* at 636.

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[6] See, *e.g., Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 378, 384-85 (1969); *Detroit & T. S.L. R.R.* v. *United Transportation Union,* 396 U.S. 142, 150-53 (1969); *Norfolk & P.B.L. R.R.* v. *Brotherhood of R.R. Trainmen,* 248 F.2d 34, 45-46 (4th Cir. 1957); *Brotherhood of Locomotive Fire & Eng.* v. *Bangor & A. R.R.,* 380 F.2d 570, 583 (D.C. Cir. 1967); *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.,* 385 F.2d 581, 613 (D.C. Cir. 1967).

This ruling was in accord with previous decisions by the Fourth Circuit Court of Appeals. Thus, in *Virginian Ry.* v. *System Federation,* 84 F.2d 641 (1936) —the decision affirmed by this Court in the opinion we discuss in detail later—the Court of Appeals upheld the validity of an injunction against a carrier which, *inter alia,* ordered it to comply with its Section 2 First obligations. Later, in *Brotherhood of Ry. Clerks* v. *Atlantic C.L. R.R.,* 201 F.2d 36 (1953), the Court of Appeals directed the grant of injunctive relief compelling the carrier to bargain with the union after the National Mediation Board had released the case and all formal procedures of the Act had been exhausted. The Court cited Sections 2 First and 2 Ninth, together with this Court's decision in *Virginian,* and stated:

> "It was the duty of the railroad under this statute to bargain in good faith with the brotherhood. ... An employer who assumes an intransigent attitude in refusing to bargain collectively manifestly does not meet the requirements of the statute merely because he listens politely to an offer and exercises politeness in declining it without making any counter offer or indicating any basis upon which he is willing to bargain. . . ." *Id.,* at 39-40.[7]

On February 24, 1970, this Court denied certiorari in *Piedmont.* 25 L.Ed. 2d 105. Ten days later, the Court of Appeals in the case at bar rejected the *Pied-*

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[7] See also *Norfolk & P.B.L. R.R.* v. *Brotherhood of R.R. Trainmen,* 248 F.2d 34, 45 n.6 (4th Cir. 1957), where in upholding a carrier's right to a strike injunction, the court in *dictum* suggested that the union's bargaining may not have "satisf[ied] the substantive requirement of negotiation imposed upon the Brotherhoods by the Act" and stated that the "negotiation required by the Act is the same 'good faith' bargaining required by the Labor Management Relations Act. . . ."

mont rule, thereby raising a conflict between circuits that only this Court can resolve.

2. The decision below conflicts not only with *Piedmont*, but also with decisions of the Courts of Appeals for the District of Columbia, Second, and Fifth Circuits. Outside the Seventh Circuit, "[T]he courts have enjoined . . . threatened and impending strikes in major disputes where good faith bargaining has not taken place in the manner and to the extent required by the Act . . . ." *Southern Ry.* v. *Brotherhood of Locomotive Fire. & Eng.*, 223 F. Supp. 296, 305 (M.D. Ga. 1962), *aff'd on basis of opinion below*, 324 F.2d 503 (5th Cir. 1963).

a. The justiciability of Section 2 First is well established by a series of decisions in the District of Columbia Circuit. In *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581 (1967), which involved a number of rather complex issues, the District Court had made the following determinations respecting the obligation to bargain in "good faith": that one set of union contract proposals was premature because served prior to the expiration of a controlling arbitration award; that the conferences held respecting those proposals, at which the carriers did not discuss the merits but instead properly insisted that the notices were premature, did not satisfy the Act's requirements respecting bargaining; and that the union was obliged to satisfy that requirement for conferences before it could call upon the Mediation Board to undertake mediation. The District Court said:

> "Under the Railway Labor Act, as it has been construed by the Supreme Court in Virginian Railway Co. v. System Federation No. 40, Railway Employees, 300 U.S. 515 . . . there is a binding

obligation on the part of both parties to conduct negotiations in good faith pursuant to notices served under Section 6 of the Railway Labor Act. The Supreme Court made it clear that the provision for negotiations was not merely an expression of a pious wish, was not hortatory, but was a command.

"There must be a *bona fide* actual negotiation, and the courts will, by appropriate decrees, require negotiations." *Akron & B.B. R.R.* v. *Order of Ry. Conductors,* 253 F. Supp. 538, 539-540 (1966).

The Court of Appeals not only affirmed that determination, upholding a restraining order against a strike (385 F.2d at 598, 614), but also held that with respect to different union notices found not to be premature the carriers had "breached their duty to enter negotiations in good faith" by refusing to discuss the merits of those proposals (385 F.2d at 597-98). Under the Seventh Circuit's view, those determinations could not have been made; they would have been within the exclusive jurisdiction of the National Mediation Board, which had actually undertaken mediation with respect to a number of the notices in question (385 F.2d at 597, 598).

Three other District of Columbia Court of Appeals decisions are in accord with *Akron.* Prior to that case, the Court of Appeals had affirmed a determination by the Railroad Retirement Board that a strike had "violated Section 2, First of the Railway Labor Act" and that therefore the striking employees were not entitled to unemployment benefits. *Brotherhood of Ry. Clerks* v. *Railroad Ret. Bd.,* 239 F.2d 37, 43-44 (1956). At about the same time as *Akron,* the Court of Appeals refused to set aside pending appeal the portion of an

injunction requiring a carrier to "exert every reasonable effort" to resolve its "major" dispute with a union, citing *Virginian* and stating: "The Supreme Court has held that a federal court may issue an injunction to compel compliance by the employer with the requirements of § 2 First." *Southern Ry.* v. *Brotherhood of Locomotive Fire. & Eng.*, 384 F.2d 323, 328 (1967). And finally, in a strike injunction context, after exhaustion of all formal procedures of the Act, the Court of Appeals, while reversing the District Court's determination that the union had violated Section 2 First by refusing to engage in multi-employer bargaining, laid down the rule that a court must decide "[w]hat constitutes good faith bargaining in the railroad industry . . . on an issue-by-issue evaluation" of the relevant facts. *Brotherhood of R.R. Trainmen* v. *Atlantic C.L. R.R.*, 383 F.2d 225, 229 (1967).[8]

In two recent cases, moreover, the United States District Court for the District of Columbia, guided by the Court of Appeals opinion in *Atlantic Coast Line,* issued strike injunctions after exhaustion of the formal procedures of the Act upon the basis of holdings that the unions had violated their statutory obligations respecting multi-employer bargaining. *Chicago, B. & Q. R.R.* v. *Railway Employes' Dept.*, 301 F. Supp. 603 (1969); *International Ass'n of Machinists* v. *National Ry. Lab. Conference,* 62 CCH Lab. Cas. ¶ 10,702 (1970). In the latter case, for example, the Court held that "[b]y initiating and negotiating the dispute on an obligatory national basis and then striking the carriers

[8] In issuing the strike injunction, the District Court had discussed the content of the "good faith bargaining" rule and had cited *Virginian* for the principle that "a fulfillment of this obligation may be compelled by judicial decree." *Atlantic C. L. R.R. v. Brotherhood of R. R. Trainmen,* 262 F. Supp. 177, 184 (1967).

on an individual basis it seems clear that the unions have violated their [Section 2 First] duty to 'exer every reasonable effort to make . . . agreements . . and settle disputes.' " (Ellipses by the Court.) 6 CCH Lab. Cas. at p. 18,313.[9]

b. The Court of Appeals for the Second Circuit ha also held Section 2 First to be enforceable by injunc tion. Its most recent decision is *Seaboard World Air lines, Inc.* v. *Transport Workers,* —— F. 2d ——, 6 CCH Lab. Cas. ¶ 10,759 (1970). There the court hel that a strike called to press bargaining demands in "major" dispute in violation of a valid contractua moratorium on such demands would violate Section First, and that accordingly a strike should be enjoine pending the district court's determination of the va lidity of the contractual moratorium. Three earlie decisions by the Court of Appeals are in accord.[10] I the first, the Court rejected a carrier's Section 2 Firs claim on the merits, *Pan American World Airway Inc.* v. *Flight Eng'rs Int'l Ass'n,* 306 F.2d 840, 84 (1962); in the second, it rejected a union's Section First claim respecting a carrier's strike insurance plan *Kennedy* v. *Long Island R.R.,* 319 F.2d 366, 370-7

[9] The *Chicago, B. & Q. R.R.* case was settled while an appeal wa pending and the District Court's judgment was ultimately vacate as moot. As to the *Machinists* case, while one of the several unio parties has noted an appeal, presumably it will not urge tha Section 2 First is not justiciable, since none of the unions so con tended in the District Court. Quite to the contrary, they con tended that the railroads, in announcing that they would respon to a "whipsaw strike" by exercising their right to lock-out, wer threatening "a clear violation of . . . Section 2 First of the Rai way Labor Act." 62 CCH Lab. Cas. at ¶ 18,311.

[10] The earliest opinion of the Court of Appeals on the subjec took note of but did not decide the question whether a strike coul be enjoined on grounds of a violation of Section 2 First. *Chicag R.I. & P. R.R.* v. *Switchmen's Union,* 292 F.2d 61, 67 (1961).

(1963); and in the third, where a union had neither resorted to grievance procedures nor served a Section 6 notice, the Court affirmed a strike injunction because the union's conduct "was a flagrant violation under the Act of the 'duty of all carriers, [and] their . . . employees to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes. . . .'" *Long Island R.R.* v. *System Federation,* 368 F.2d 50, 53 (1966) (Elipses by the Court).

The District Courts in the Second Circuit, moreover, have granted either temporary restraining orders or preliminary injunctions against strikes on Section 2 First grounds after exhaustion of the Act's formal procedures in the following cases: *Pan American World Airways, Inc.* v. *Brotherhood of Ry. Clerks,* 185 F. Supp. 350 (E.D.N.Y. 1960); *Long Island R.R.* v. *Brotherhood of R.R. Trainmen,* 185 F. Supp. 356 (E.D.N.Y. 1960); *Chicago, R.I. & P. R.R.* v. *Switchmen's Union,* 187 F. Supp. 581 (W.D.N.Y. 1960), *rev'd on other grounds,* 292 F.2d 61, 67 (2d Cir. 1961); *Pan American World Airways, Inc.* v. *Flight Eng'rs Int'l Ass'n* (unreported) (E.D.N.Y. 1961), *rev'd on other grounds,* 306 F.2d 840 (2d Cir. 1962). See also *American Airlines, Inc.* v. *Air Line Pilots Ass'n,* 169 F. Supp. 777, 787-790, 793, 798 (S.D.N.Y. 1958) (*dictum*); *Kennedy* v. *Long Island R.R.,* 211 F. Supp. 478, 486-488 (S.D.N.Y. 1962), *aff'd,* 319 F.2d 366, 370 (2d Cir. 1963) (*dictum*); *Long Island R.R.* v. *International Bro. of Teamsters,* 57 CCH Lab. Cas. ¶ 12,378 (E.D.N.Y. 1967); *KLM Royal Dutch Airlines* v. *Transport Workers,* 49 CCH Lab. Cas. ¶ 18,990 (E.D.N.Y. 1964) at p. 31,496. In granting relief in *Long Island R.R.* v. *Brotherhood of R.R. Trainmen,* the Court observed with respect to Section 2 First that "[t]o effectuate the purposes of the Act and to prevent a mockery

of its requirements such efforts [to settle] must be reasonable and made in good faith and not simply to satisfy perfunctory compliance." 185 F. Supp. at 358. And in *Pan American World Airways, Inc.* v. *Brotherhood of Ry. Clerks,* the Court responded to the union's argument that " '[t]here is no requirement in the Railway Labor Act that a Union bargain in good faith' " by saying: "To this the Court cannot agree. If compliance with the Act need only be perfunctory, the congressional mandate would be defeated and the purposes of the Act rendered nugatory." 185 F. Supp. at 353. In short, as the Court in *KLM Royal Dutch Airlines* put it: "Good faith effort to resolve disputes and exhaustion of the process is a condition precedent to the use of economic pressures and forces." 49 CCH Lab. Cas. at p. 31,496.

c. In the Fifth Circuit also the justiciability of claims under Section 2 First is clearly established. In *United Industrial Workers* v. *Galveston Wharves,* 400 F.2d 320, 324 (1968), the Court of Appeals observed that the District Court had correctly ordered the carrier to bargain in good faith because "the Act requires that . . . the parties must make every reasonable effort to settle their differences in conference" and because " 'one of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all parties . . . to negotiate' [citing *Elgin, J. & E. Ry.* v. *Burley,* 325 U.S. 711, at 721 n. 12]." In *Richardson* v. *Texas & N.O. R.R.,* 242 F.2d 230, 235 (1957), the Court held a carrier liable for entering into racially discriminatory collective bargaining agreements because Section 2 First "imposed directly upon the Railroads the duty to 'make and maintain agreements' in compliance with the provisions of the Rail-

way Labor Act. . . ." And in *Southern Ry.* v. *Brotherhood of Locomotive Fire. & Eng.*, 223 F. Supp. 296, 308 (M.D. Ga. 1962), *aff'd*, 324 F.2d 503 (1963), the District Court, in an opinion adopted by the Court of Appeals, dismissed a carrier's injunction suit as premature but, citing a number of decisions discussed in this petition, said that "should . . . a strike become imminent" the carrier could seek relief again "if willing to assume the burden of proving that the defendants have not complied with their statutory duty to bargain in good faith." See also *National Airlines, Inc.* v. *International Ass'n of Machinists*, 416 F.2d 998, 1003 n. 3 (5th Cir. 1969).[11]

3. That the weight of authority should be so heavily and uniformly against the decision of the lower court is not surprising, for that decision cannot be reconciled with *Virginian Ry.* v. *System Federation*, 300 U.S. 515 (1937), the authority cited by many of the lower courts in the cases described above and surely one of the most important of this Court's Railway Labor Act decisions. In *Virginian* the plaintiff union, which had won a rep-

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[11] Three District Court decisions in other circuits are relevant. In *Flight Engineers Int'l Ass'n* v. *Trans World Airlines, Inc.*, 305 F.2d 675 (8th Cir. 1962), the District Court, in an unreported decision subsequently vacated as moot, granted a strike injunction on the basis of a violation by the union of Section 2 First. In *Northwest Airlines, Inc.* v. *Airline Pilots Ass'n, Int'l*, 185 F. Supp. 77, 80 (D. Minn. 1960), the District Court entertained an injunction claim grounded upon an asserted violation of Section 2 First, but found that the carrier did not "discharge . . . its burden of showing an absence of good faith" on the part of the union. And in *Capitol Airways, Inc.* v. *Air Line Pilots Ass'n*, 41 CCH Lab. Cas. ¶ 16,739, at p. 23,837 (M.D. Tenn. 1961), the Court found jurisdiction to issue a declaratory judgment because of Section 2 First, "which imposes upon all carriers and their employees the duty to exert every reasonable effort to make and maintain agreements. . . ."

resentation election conducted under Section 2 Ninth of the Act (45 U.S.C. § 152 Ninth), sought judicial intercession when the carrier continued to deal with a "company union." The union grounded its claim upon several provisions of the Railway Labor Act, including Section 2 Ninth and Section 2 First. The District Court held for the union, entering an injunction which directed the carrier both to "treat with" the union, in the language of Section 2 Ninth, and "to exert every reasonable effort to make and maintain agreements" with the union, in the language of Section 2 First. *Id.*, at 540.

In this Court, the carrier attacked both parts of the injunction on the theory that the statutory provisions upon which they were based were intended by the Congress to be merely precatory. The principal authority advanced in support of this argument was this Court's holding in *Pennsylvania R.R. System Federation* v. *Pennsylvania R.R.*, 267 U.S. 203 (1925), that the forerunner of Section 2 First—Section 301 of the Transportation Act of 1920 (41 Stat. 456, 469)—was "without legal sanction in the Act." 300 U.S. at 544. Beyond that, the carrier urged that the subject matter of the injunction, which involved evaluation of the carrier's good faith, was not suitable for judicial inquiry.[12]

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[12] In countering these arguments, it is worth noting that the union had the support of the United States, which appeared as *amicus curiae*. Thus, the Solicitor General urged:

> "A review of the history and context of these sections . . . shows that Congress intended the obligations imposed by paragraphs First, Second, and Ninth of § 2, to be both mandatory and enforceable.
>
> "Enforcement of paragraphs First, Second, and Ninth of § 2 is in fact essential to the success of the statutory plan for amicable settlement of disputes through conferences between representatives of the parties. . . ." 300 U.S. at 536.

This is how the Court summarized the carrier's principal argument:

> "But petitioner insists that the statute affords no legal sanction for so much of the decree as directs petitioner to 'treat with' respondent Federation and 'exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise.'" 300 U.S. at 544.

And this is how the Court rejected that argument:

> "The policy of the Transportation Act [of 1920] of encouraging voluntary adjustment of labor disputes, made manifest by those provisions of the Act which clearly contemplated the moral force of public opinion as affording its ultimate sanction, was . . . abandoned by the enactment of the Railway Labor Act. Neither the purposes of the later Act, as amended, nor its provisions when read, as they must be, in the light of our decision in the *Railway Clerks* case [*Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks*, 281 U.S. 548 (1930)] . . . lend support to the contention that its enactments, which are mandatory in form and capable of enforcement by judicial process, were intended to be without legal sanction.
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> * * * * * *
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> "The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First." *Id.* at 545, 548 (footnote omitted).

As to the carrier's secondary argument respecting the propriety of judicial relief, the Court summarized the carrier's position in this way:

> "Petitioner contends that . . . negotiation depends on desires and mental attitudes which are beyond judicial control, and that since equity cannot compel the parties to agree, it will not compel them to take the preliminary steps which may result in agreement." *Id.* at 549-550.

And this is how the Court disposed of that contention:

> "Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees." *Id.* at 550.

In the case at bar, as the court below noted, petitioner "place[d] great reliance" upon *Virginian* (CA Op. *infra* p. 18a). But the court below thought that *Virginian* meant only that the parties in negotiating "should be guided by" Section 2 First, not that a refusal to comply with that provision could be remedied by judicial decree. That is so, the court below said, because this Court in *Virginian* "did not state nor imply that whether reasonable effort is in fact complied with by either party was a question for the courts to answer" (CA Op. *infra* pp. 18a-19a).

In this the Court of Appeals erred. This Court in *Virginian* not merely "implied," but explicitly "stated," that compliance by the carrier with its Section 2 First obligation was "a question for the courts to answer." It so "stated" when it wrote that the Act "requires the employer . . . to make reasonable effort to compose differences" and "to enter into a

negotiation for the settlement of labor disputes such as is contemplated by § 2, First," and when it wrote that "whether action taken or omitted is in good faith or reasonable [is an] everyday subject of inquiry by courts in framing and enforcing their decrees." And just as surely this Court "implied" the same thing when it rejected the argument that Section 2 First "affords no legal sanction" for so much of the injunction as required the carrier to "exert every reasonable effort" to settle its disputes with the union.

Even if the *Virginian* opinion were in any way ambiguous with respect to the Section 2 First question, that ambiguity would be erased by this Court's description of *Virginian* in another of its leading Railway Labor Act opinions, *Elgin, J. & E. R.R.* v. *Burley*, 325 U.S. 711, 721-722 n. 12 (1945), *adhered to on rehearing*, 327 U.S. 661 (1946). There, citing *Virginian* as authority for the proposition that Section 2 First is "judicially enforceable," this Court stated:

> "Thus, one of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all parties to a dispute to negotiate for its settlement. See note 26 [quoting Section 2 First and other of the subsections of Section 2]; *Virginian R. Co.* v. *System Federation*, 300 U.S. 515; *cf. Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 300, 320; *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 331, 334. This duty is not merely perfunctory. Good faith exhaustion of the possibility of agreement is required to fulfill it. *Cf. Virginian R. Co.* v. *System Federation, supra*, at 548, 550; *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U.S. 50, 56 ff. . . ."[13]

[13] And, again, on rehearing, the Court in *Burley* said: "We also pointed out that the Act imposes correlative affirmative duties upon the carrier, the collective agent and the aggrieved employee to make every reasonable effort to settle the dispute." 327 U.S. 661, 665 (1946).

All subsequent references in this Court's opinions to *Virginian* and Section 2 First are in accord with *Burley*. See *Brotherhood of Ry. Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U.S. 650, 658 (1965) (reaffirming *Virginian's* declaration that the Act requires "a negotiation for the settlement of labor disputes such as is contemplated by § 2, First"); *Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330, 339 (1960) (referring to the "Act's command that employees as well as railroads exert every reasonable effort to settle all disputes"); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 758 (1961) (stating that Section 2 First "created affirmative legal duties on the part of the carriers and their employees"); *Stark* v. *Wickard*, 321 U.S. 288, 303 (1944) (citing *Virginian* as relating to "a right created by statute [which] is mandatory in character and obviously capable of judicial enforcement"); *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192, 207 (1944); *Switchmen's Union* v. *NMB*, 320 U.S. 297, 300-301 (1943); *Tunstall* v. *Brotherhood of Locomotive Fire. & Eng.*, 323 U.S. 210, 213-14 (1944).[14]

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[14] For commentators' views of *Virginian* and Section 2 First, see Meltzer, "The Chicago & North Western Case: Judicial Workmanship and Collective Bargaining," *1960 Supreme Court Review* 113, 125-126 and note 54 (In *Virginian* "the Court sanctioned the use of an injunction against an unwilling employer to enforce the duty to bargain." The "Court's statement that the Act requires the employer to make 'reasonable effort to compose differences'" is not *dictum*, because "the injunction sustained in *Virginian Railway* required the employer not merely to recognize the union but also to 'exert every reasonable effort to make and maintain agreements.'"); Note, 59 *Mich. L. Rev.* 459, 463 n. 27 (1961) (Section 2 First "is enforceable by order of a federal court," citing *Virginian*); Cox, "The Duty to Bargain in Good Faith," 71 *Harv. L. Rev.* 1401, 1404 (1958) (Section 2 First "is enforceable by a private suit for an injunction," citing *Virginian*); Highsaw, "The

Thus the decision below, in holding that "§ 2, First, does not contemplate judicial enforcement" (CA Op. *infra* p. 13a), is both literally and substantively in conflict with *Virginian's* holding, as summarized in *Burley,* that this provision is "judically enforceable."

4. While the lower court thought distinguishable the decision that is plainly in point, *Virginian,* it thought pertinent a decision that is plainly distinguishable, *General Committee* v. *Missouri-K-T R.R.,* 320 U.S. 323 (1943). That case involved a representational dispute between two unions in which one of them sued to prevent the carrier from dealing with the other with respect to certain issues, claiming that it was the sole representative authorized to negotiate about those issues. The plaintiff union relied on paragraphs First, Second, Fourth, and Ninth of Section 2 of the Act. In holding that the claim was not justiciable, this Court devoted most of its opinion to provisions other than Section 2 First. Its only mention of this provision appears in the following sentence, upon which the lower court in the case at bar relied: "But § 2, Second, like § 2, First, merely states the policy which those other provisions buttress with more particularized commands" (footnote omitted). 320 U.S. at 334.

But by this the Court meant only that the justiciability of the plaintiff's claim arising from a jurisdictional dispute was to be tested by reference to the statutory provision specifically relating to such dis-

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Need for Re-evaluation of Labor Legislation," "Symposium on Air Transport Labor Relations," 35 *J. Air L. & C.* 313, 450, 455 (1969) (Section 2 First "creates an enforceable obligation in the federal courts . . . It is in essence a requirement of 'good faith' bargaining by the parties."). See also Smith, "The Evolution of the 'Duty to Bargain' Concept in American Law," 39 *Mich L. Rev.* 1065, 1099-1100 (1941).

putes, Section 2 Ninth (45 U.S.C. § 152 Ninth), rather than by reference to Section 2 First. The basis for the Court's holding was its conclusion that the Congress, by enacting Section 2 Ninth and thereby authorizing the National Mediation Board "to resolve a wide range of jurisdictional disputes between unions," evidenced an intent "not to leave their solution to the courts." 320 U.S. at 336. This was so even assuming that some types of jurisdictional disputes would not be within the Board's Section 2 Ninth jurisdiction, because "it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others." *Id.* at 336-37. The legislative purpose reflected in the "more particularized commands" of Section 2 Ninth could not be circumvented by reliance upon the more general provisions of Sections 2 First and 2 Second. Or, as the Court put it with respect to the latter provision, "Nor does § 2, Second make justiciable what otherwise is not." *Id.* at 334. But this does not mean that claims under Section 2 First which do *not* involve representational or jurisdictional disputes are not justiciable. *Virginian* held that they are, for there, as we have indicated, this Court affirmed an injunction commanding obedience to Section 2 First after the plaintiff union's representational dispute had been resolved by the National Mediation Board under Section 2 Ninth. That holding was not diluted by *Missouri-R.-T.*[15]

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[15] That this is the correct interpretation of *Missouri-K.-T.* is also clear from the passage in *Burley* we have already quoted (*supra* p. 21). There, the Court reaffirmed that *Virginian* established that Section 2 First imposes obligations that are "judicially enforceable," and in that connection simply cited *Missouri-K.-T.* with a "*cf.*" signal. Moreover, in other opinions this Court has explained *Missouri-K.-T.* as a case in which the Act did not de-

5. *Virginian,* moreover, was correctly decided. In view of the office of this petition, we here merely summarize some of the principal relevant factors bearing on the justiciability of Section 2 First. The question, of course, is one of legislative intent. As to that, Section 2 First is written in mandatory, not hortatory, terms, and it is, as this Court has said, the "heart" of the statutory scheme.[16] The presumption is, therefore, that the Congress did not intend that parties should be able to ignore with impunity the bargaining duty established by the statute. Nor is there anything in the nature of that duty beyond the competence of the judicial power. That is established by *Brotherhood of R.R. Trainmen* v. *Toledo, P. & W. R.R.,* 321 U.S. 50 (1944), where this Court held that a railroad had violated a statutory provision—Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108)—that also obliges parties to a labor dispute to "make every reasonable effort to settle such dispute." Finally, the legislative history of Section 2 First supports the conclusion that it was designed to be judicially enforceable. The thrust of that history is best summarized in the following statement of Mr. Donald Richberg,

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pend upon judicial enforcement of a statutory command in view of prescribed administrative remedies, in contrast to *Virginian* where there was "no mode of enforcement other than resort to the courts." *Steele* v. *Louisville & N. R.R.,* 323 U.S. 192, 207 (1944); see also *Switchmen's Union* v. *NMB,* 320 U.S. 297, 300 (1943) ("If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control," citing *Virginian*); *Tunstall* v. *Brotherhood of Locomotive Fire. & Eng.,* 323 U.S. 210, 213-214 (1944); *Stark* v. *Wickard,* 321 U.S. 288, 303, n. 17 (1944).

[16] *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 377 (1969).

spokesman for the unions, in urging enactment of the statute:

> "In the first place, it is their duty to exert every reasonable effort . . . to settle all disputes, whether arising out of the abrogation of agreements or otherwise, in order to avoid any interruption to commerce. In other words, the legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate violation of that legal obligation could be prevented by court compulsion." "Railroad Labor Disputes," *Hearings before House Committee on Interstate and Foreign Commerce on H.R. 7180*, 69th Cong., 1st Sess. (1926), p. 91.[17]

6. Finally, apart from the conflict in decisions respecting the judicial enforceability of Section 2 First, the underlying determination of the lower court that the National Mediation Board has an "adjudicatory or quasi adjudicatory" role which "requires it . . . to enforce compliance with § 2, First" (CA Op. *infra* pp. 16a, 18a) deserves review for the following reasons:

a. There is as to this issue the same conflict among circuits that exists with respect to the intimately related question of the justiciability of Section 2 First. Each of the decisions cited above in which the courts have passed on the merits of Section 2 First claims is incompatible with the holding below that the Board has exclusive jurisdiction over such claims.[18] More-

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[17] For similar testimony by Mr. Richberg, see *id.*, at 40.

[18] Thus, for example, other Courts of Appeals have invaded what the court below considered to be the exclusive province of the Mediation Board when they held that a union's refusal to designate representatives with full authority to conclude agreements did not violate Section 2 First (*Chicago, R.I. & P. R.R.* v. *Switchmen's Union*, 292 F.2d 61 (2d Cir. 1961)); that a union's refusal to engage in multi-employer bargaining will violate Section 2 First in some disputes but not in others (*Brotherhood of R.R. Trainmen* v. *Atlantic C.L. R.R.*, 383 F.2d 225 (D.C. Cir. 1967)); and that

over, had any of those courts thought that the Board had even coordinate jurisdiction with the courts over Section 2 First claims, traditional principles of primary jurisdiction would doubtless have led them to refrain from adjudication pending a determination by the Board. Instead, it is plain that the common judicial understanding has been, as this Court said just this Term in *Detroit & T.S.L. R.R.* v. *United Transportation Union*, 396 U.S. 142, 158-159 (1969), that "the Mediation Board has no adjudicatory authority with regard to major disputes, nor has it a mandate to issue regulations construing the Act generally." [19]

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a union's refusal to permit its representatives to bargain over certain matters could violate Section 2 First (*Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n*, 416 F.2d 633 (4th Cir. 1969)). For other similar "good faith bargaining" issues determined by the Courts of Appeals, see *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581, 597-98 (D.C. Cir. 1967) (refusing to bargain over valid demands and pressing invalid ones); *Brotherhood of Ry. Clerks* v. *Railroad Ret. Bd.*, 239 F.2d 37, 43-44 (D.C. Cir. 1956) (participating in a "wildcat" strike); *Pan American World Airways, Inc.* v. *Flight Eng'rs Int'l Ass'n*, 306 F.2d 840, 849 (2d Cir. 1962) (refusal to make concessions); *Kennedy* v. *Long Island R.R.*, 319 F.2d 366, 370-371 (2d Cir. 1963) (carriers' adoption of a multi-employer strike insurance plan); *Seaboard World Airlines, Inc.* v. *Transport Workers*, — F.2d —, 62 CCH Lab. Cas. § 10,759 (2d Cir. 1970) (pressing bargaining demands in violation of a contractual moratorium). Questions of whether "action taken or omitted is in good faith or reasonable" are thus "everyday subjects of inquiry by courts," as this Court noted in *Virginian*, 300 U.S. at 550.

[19] See also *Chicago, R.I. & P. R.R.* v. *Switchmen's Union*, 292 F.2d 61, 67 (2d Cir. 1961), where the Court said that Section 2 First issues come to the courts "without the advance administrative screening provided under the National Labor Relations Act," and *Pan American World Airways, Inc.* v. *International Bro. of Teamsters*, 275 F. Supp. 986, 995 (S.D. N.Y. 1967), *aff'd on basis of opinion below sub nom. Brotherhood of Ry. Clerks* v. *Pan American World Airways, Inc.*, 404 F.2d 938 (2d Cir. 1969), where the Court said that "mediation proceedings are designed merely to bring the parties to an agreement" and that "[i]n such mediation the Board performs no adjudicative function . . . ."

b. This judicial understanding of the role of the Board is paralleled by the Board's own view of its authority. So far as we have been able to discover, the Board has never exercised the statutory function that the lower court in the case at bar says it has. We have examined each of the thirty-five annual reports of the Board, as well as its four published summaries of its work. While each of these documents describes the functions of the Board in detail, none of them so much as hints that the Board believes it has the authority or the duty respecting Section 2 First questions attributed to it by the court below. Rather, the Board consistently speaks of its role as confined to informal conciliation and mediation. Thus, for example, in its Sixteenth Annual Report (1950), the Board, in describing the structure of the Act and the character of the Board's responsibilities, said:

> "The National Mediation Board has no enforcement powers but acts purely as a mediatory agency, which means that its representative sits as a friendly officer of the United States Government, armed only with the weapon of friendly counsel and practical assistance in an effort to make collective bargaining successful" (p. 17).[20]

The report on the Mediation Board by the Attorney General's Committee on Administrative Procedure agrees. As the Board observed in its *Seventh Annual* Report (1941) (p. 4), "the Committee remarked that:

> " 'Although the mediation activities of the Board are of very considerable importance in assuring

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[20] See, also, *e.g.*, *Nineteenth Annual Report* (1953), pp. 22-23; *Twenty-fourth Annual Report* (1958), pp. 5-6; *Twenty-fifth Annual Report* (1959), pp. 4-5; *Twenty-sixth Annual Report* (1960), p. 5; *Twenty-seventh Annual Report* (1961), p. 5.

uninterrupted transportation by rail and air, they do not lend themselves to procedural study. By definition they are of an informal nature, involving negotiation rather than decision.' "

Moreover, in a speech given just last year, a former Chairman of the Board indicated quite clearly that the Board did not pass upon whether the parties were in compliance with Section 2 First and pointed out some of the problems the Board would encounter if it attempted to do so.[21] Finally, that the Board has not attempted to decide Section 2 First questions—and also that it believes that 2 First is judicially enforceable—is confirmed by a brief *amicus curiae* for the United States in *Chicago, R.I. & P.R.R.* v. *Switchmen's Union*, 187 F. Supp. 581 (W.D. N.Y. 1960), *reversed*, 292 F.2d 61 (2d Cir. 1961). There the United States not only argued that Section 2 First was justiciable, but also indicated that the position of the Board was that the practice of the union in that case in submitting negotiated contracts to a referendum of its membership was

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[21] In that speech, Mr. Howard Gamser, a former member of the Board and Chairman in 1965 and 1968, said that "[s]ome airline spokesmen" had maintained that the Board should not begin mediation until it concluded that the parties had complied with their Section 2 First duties, and that the Board also should not release a case from mediation "if either party has not, in the opinion of the Board, 'made every effort to resolve the dispute . . . .' " That is, those "spokesmen" took the position adopted by the lower court in the case at bar. Mr. Gamser characterized this as advocating a "greater exercise of discretion than heretofore employed" by the Board, questioned whether there is "statutory language to allow the Board to make such a determination," and discussed the procedural steps—such as investigations and hearings—that might have to be employed. "The Role of Mediation in Airline Labor Disputes," "Symposium on Air Transport Labor Relations," 35 *J. Air L. & C.* 313, 505, 510 (1969).

contrary to the requirements of Section 2 First.[22] Had the Board followed the course staked out for it by the opinion of the lower court in the case at bar, it would have decided the Section 2 First question against the union and would not have terminated mediation—thereby foreclosing the union from striking—until the union abandoned the referendum practice.

c. The view of the Board and of the courts outside the Seventh Circuit is supported by both the relevant statutory language and the legislative history of the Act. Nothing in the statutory language gives the Board power to adjudicate whether parties to a "major" dispute are making every reasonable effort to resolve the dispute. The only conceivably relevant provision, Section 5 First (45 U.S.C. § 155 First, *supra* p. 3), simply directs the Board to exercise *its* best efforts to bring about a settlement. It gives the Board no authority at all to decide whether the parties have exercised *their* best efforts or to impose any sanction if it decides they have not. The Board is required to terminate its services when it determines that *its* efforts have failed to produce an agreement, not when it determines that the parties' efforts have (or have not) complied with the Act.

The legislative history of the statute shows that the omission from Section 5 of any grant of adjudicatory authority was deliberate. The Act was drafted jointly by representatives of industry and the unions.[23] Their

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[22] See Suggestion of the Interest of the United States and a Motion for Leave to File a Brief of Amicus Curiae, printed in Appendix to Brief for Plaintiffs-Appellees, pp. 7-11; Brief of the United States Amicus Curiae in the District Court pp. 2-10.

[23] See *Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks*, 281 U.S. 548, 563-564 (1930).

principal spokesmen in the hearings were Messrs. Donald R. Richberg for the unions and A. P. Thom for the railroads. We set forth in the margin the many statements by these two witnesses which establish beyond question that, so far as the architects of the bill were concerned, the role of the Board in the mediation prescribed by Sections 5 and 6 of the Act would be restricted to informal and confidential conciliation, and that this role would be undercut if the Board were to "make public reports . . . condemning one party or the other," or if it were to "render any decision" or "to make findings" or to be a "sort of super-labor board." As Mr. Thom summarized the matter, "The board of mediation has no right to make findings; they have only the function of conciliation and persuasion. . . ."[24]

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[24] Messrs. Richberg and Thom testified as follows in "Railroad Labor Disputes," *Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7180*, 69th Cong., 1st Sess. (1926), and in "Railway Labor Act," *Hearings before the Senate Committee on Interstate Commerce on S. 2306*, 69th Cong., 1st Sess. (1926):

"... The board of mediation, to preserve its ability to mediate year after year between the parties, must not be given any duties to make public reports condemning one party or the other, even though the board may think one party is wrong. That is the fundamental cause of failure of the Labor Board. . . . The board of mediators should never make any reports to the public condemning one party or the other. Their duty is that of remaining persuaders . . . ." *House Hearings*, at 18 (Richberg).

"Well, in all respects that I can see, they [mediation proceedings] should be regarded as private hearings. They are not private in this sense, that of course if mediation is called for in a situation that is of public interest, the public will know that the mediators are operating in the situation, but there will not be public hearings in the sense that the mediators will not sit behind the table and call witnesses and have

A recent opinion by the Court of Appeals for the District of Columbia Circuit confirms our view that Congress considered that granting adjudicatory power to the Board would compromise its mediatory role. In *International Ass'n of Machinists* v. *NMB*, — F.2d —, 62 CCH Lab. Cas. ¶ 10,621 (D.C. Cir. 1970), the Court, drawing upon the legislative history of the Act, had this to say:

> ". . . It is because the mediator acts as a catalyst for settlement rather than a judge that the

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the general public present to hear the presentation. In other words, they are trying to settle a controversy, not to make it worse." *House Hearings*, at 89 (Richberg).

". . . The board of mediation attempts to bring them [the parties] to an agreement, first, as to the dispute itself, and if that fails, then an agreement to arbitrate. But the board of mediation does not render any decision." *House Hearings*, at 131 (Thom).

"The board of mediation has no right to make findings; they have only the function of conciliation and persuasion. . . ." *House Hearings*, at 136 (Thom).

". . . It is to be assumed . . . that the board of mediation will act as the old board of mediation used to act, by interviewing the parties, by attempting through conciliatory methods and persuasion to induce them to agree, and failing that effort, to bring about arbitration. But that board is not intended to make any statement to the public if that is what you mean." *Senate Hearings*, at 11 (Thom).

"Now the board of mediation is intended to continue to be regarded by both parties as an impartial body whose services will be valuable, and bring them together. . . . They must continue with their powers of conciliation unimpaired, and they could not do that if they are to render judgment. So that there never was a purpose to make the board of conciliation a fact-finding commission or to have a report on the merits." *Senate Hearings*, at 13 (Thom).

". . . Now you are going to destroy that [mediation] function if you set that board up in this law in such a manner that you appear to be creating another Labor Board, a sort

Supreme Court was minded to say—'The concept of mediation is the antithesis of justiciablity.' *General Committee* v. *M.K.T. R. Co.*, . . . 320 U.S. 323, 337 (1943).

* * * * * *

"The Railway Labor Act of 1926 was drafted by a committee representing railroads and railroad unions. . . . The committee hearings reveal the essential ingredients and underlying philosophy of the proposal expressed by the principal spokesman [sic] for both labor and management. The mediation board is to operate in private conferences, not public sessions. The board will confine itself to the function of conciliation and persuasion, exerting its good offices to bring the parties together. It will not make findings, or even statements to the public, for these would undercut its

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of super-labor board that will come in and solemnly sit behind a table and summon witnesses and take evidence and consider the matter in private conference, and then issue an unenforceable opinion. Now that is not going to help the situation very much, as has been demonstrated by the Labor Board. When you require men to testify in public you know the care with which they must weigh their words, you know how difficult it is quickly to arrive at all the underlying factors in the controversy. But when men are brought into private conference, when a dispute is investigated informally and the men on both sides can be talked to freely and frankly, that is the reason why Government mediation has been successful in the past, and that is the reason why Government mediation should be successful under this bill and never call for the creation of an emergency board." *Senate Hearings*, at 83-84 (Richberg).

". . . This mediation board does not decide anything except in a single case. It is only intended to exert its good offices to bring the parties together . . . . The mediation board does not [decide anything], except in the single case mentioned [in what is now 45 U.S.C. § 155 Second], where they give an interpretation of an existing agreement after hearing. . . ." *Senate Hearings*, at 157 (Thom).

status as a body recognized by both sides as impartial, and would impair its ability to constitute a significant force for conciliation, not only in the particular case, but in general and in the future. Stressed and restressed was the need to retain the board in a position where it could operate by conciliation and persuasion, and the view that this position would be undercut if it gave statements or opinions, for the party standing condemned by the thrust of such a statement would or at least might conclude that the board was being unfair" (footnote omitted). *Id.*, at pp. 18,042-43.

7. The decision below will have disruptive consequences for both the Board and the parties to collective bargaining under the Railway Labor Act. Where one party believes that the other is not complying with Section 2 First, what is it to do? The question whether the party can secure a judicial decision respecting the issue depends on whether suit is brought in the Seventh Circuit or, say, the District of Columbia Circuit where such claims have been adjudicated several times in the last few years (see *supra* pp. 11-14). Accordingly, the question whether to seek adjudication by the Board will turn in large measure upon the available judicial forum in terms of venue, personal jurisdiction, and a guess as to whether the "race to the courthouse" can be won. And if the party decides to invoke what the court below considers to be the Board's jurisdiction, what is the Board to do? If it follows its past practice, it may be subject to mandamus in the Seventh Circuit but nowhere else. If it abandons that practice and assumes the role of judge, the fear of the Congress that its mediatory role will be undercut may be realized. These jurisdictional problems will unavoidably disturb labor relations in the railroad and airline industries until they are settled by this Court.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969—JANUARY SESSION, 1970

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 18109

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, *Plaintiff-Appellant,*

v.

UNITED TRANSPORTATION UNION, *Defendant-Appellant.*

No. 18145

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, *Plaintiff-Appellee,*

v.

UNITED TRANSPORTATION UNION, *Defendant-Appellee.*

MARCH 6, 1970

Before SWYGERT, *Chief Judge,* FAIRCHILD and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* This opinion contains our decision in two appeals. No. 18145 is the appeal of the Chicago and North Western Railway Company (Railway) from the district court's finding that § 2, First,[1] of the

[1] 45 U.S.C. § 152, First, provides:

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Railway Labor Act (45 U.S.C. § 152, First) requiring the parties to exert "every reasonable effort" to settle their disputes was not a requirement which anticipated judicial enforcement. Consequently, since the district court found that it did not have jurisdiction to decide whether § 2, First, was complied with, and all other procedures of the Railway Labor Act having been exhausted, the district court held that the Norris-LaGuardia Act[2] prohibited the enjoining of a threatened strike by the United Transportation Union (Union). The district court, however, granted an injunction against the threatened Union strike pending an appeal of its decision of the justiciability of § 2, First, and the correctness of the court's order granting the injunction pending appeal is the subject of the second appeal, No. 18109, in which the Union is the appellant. We affirm the decision of the district court in both appeals.

The factual basis of the two appeals arose out of a dispute between the United Transportation Union and the Chicago North Western Railway Company over the question of how many brakemen should be employed on the Railway's trains. Such a dispute is commonly known as a crew consist controversy. The dispute was initiated in July of 1965 by service by the Union upon the Railway of notices pursuant to § 6 of the Railway Labor Act (Act)

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[2] Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) provides in relevant part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> • • • • •

(45 U.S.C. § 156)[3] requesting a change in agreements to require that not less than two brakemen be employed on every freight and yard crew. In response, the Railway in December of 1965 served notices requesting an agreement that the existing rules respecting minimum crews be rescinded and the matter of crew size be committed to the judgment of management.[4]

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[3] Section 6 (45 U.S.C. § 156) provides:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

[4] While the historical background of the litigation involved in crew consist controversies is not directly relevant, a brief discussion of the more recent developments in this area may be helpful for a more meaningful grasp of the problems.

The dispute over the number of brakemen to be employed began to be discussed in 1959 when most of the nation's railroads served notices upon various unions under § 6 of the Act proposing rules that would permit, in the discretion of management, the elimination of firemen and reduction in the number of brakemen. The unions countered in 1960 by serving uniform notices proposing a national rule requiring a minimum of two brakemen on every crew.

The issues were joined and negotiated on an industry-wide basis and were not resolved until in the face of a threatened nationwide

By November of 1969, the parties had held conferences pursuant to § 6 (45 U.S.C. § 156);[5] the National Mediation Board had mediated the dispute after invocation of mediation pursuant to § 5 (45 U.S.C. § 155);[6] the Board, pur-

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strike the Congress enacted a compulsory arbitration statute. (77 Stat. 132).

Under the arbitration prescribed by the Congress in 1963, Arbitration Board No. 282 established a national procedure for resolving the "crew consist" issue over the number of brakemen on train crews. The parties were directed to conduct local negotiations on each carrier, and, in the event of failure of agreement, to conduct local arbitration, all pursuant to national guidelines respecting questions of work burden and safety.

The arbitration award expired in January of 1966. The United Transportation Union served notices upon more than eighty railroads pursuant to § 6, proposing restoration of the crew of one conductor and two brakemen. The railroads responded with a request for an agreement permitting crew reductions beyond those authorized under the award of Arbitration Board No. 282.

[5] See footnote 3, *supra*.

[6] Section 5 First and Second (45 U.S.C. § 155 First and Second) provide:

> First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:
>
> (a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.
>
> (b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.
>
> The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.
>
> In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this

suant to § 5, had concluded that its efforts had been unsuccessful and had proffered arbitration; the Railway had accepted that proffer but the Union declined; the Board thereupon, on October 16, 1969, had terminated its services pursuant to § 5. The President had not appointed an Emergency Board under § 10 (45 U.S.C. § 160),[7] and the

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title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

[7] 45 U.S.C. § 160 provides:

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the

§ 5 thirty day "cooling off" period respecting maintenance of the status quo had expired.

At the end of November, the Railway instituted a lawsuit in the district court asking the court to declare that the procedures of the Railway Labor Act had not been exhausted and to enjoin the Union from exercising self-help in the form of strike. The Railway alleged that the Union had not discharged all its obligations under the Railway Labor Act in that it had not complied with § 2, First, which imposes upon the parties the "duty to exert every reasonable effort" to settle their disputes. At the same time the Railway filed its complaint it moved for a temporary restraining order which the court granted.

The Railway then presented evidence to show that the Union had violated § 2, First, by not bargaining in good faith. At the conclusion of the Railway's case, the court granted defendant Union's motion to dismiss the complaint and dissolved the temporary restraining order on the basis that:

> § 2, First, . . . is a matter for administrative determination and has been determined by the National Mediation Board under the provisions of Sections 5 and 6 of the Railway Labor Act, 45 U.S.C. 155, 156, is not justiciable and this Court does not have

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dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

jurisdiction to consider or adjudicate disputes with respect to compliance with such subsection, particularly after the National Mediation Board has relinquished its mediatory jurisdiction of a dispute as in this case.

The district court, however, recognizing that there was case law contrary to its decision, that a strike would result in a mooting of the appeal, and that "such a strike would irreparably injure the plaintiff and the public," granted plaintiff Railway's motion for an injunction pending appeal.

Three days after the district court's decision, the Union filed an emergency motion in this court to vacate the injunction pending appeal. This court issued an order directing that the Union's motion to vacate the injunction pending appeal be taken with the Railway's appeal from the district court's denial of an injunction below. The order also directed that the appeals be expedited. (See *Chicago and North Western Railway Company* v. *United Transportation Union*, No. 18109 unpublished order, 7th Cir. Dec. 19, 1969.)

By ordering that the Union's motion to vacate the injunction pending appeal be taken with the expedited appeal from the district court's denial of a preliminary injunction, we in effect upheld the granting of the injunction pending appeal. Our order of December 19, 1969, in that respect is inconsistent with this court's decision in *Elgin J. & E. Ry. Co.* v. *Brotherhood of Railroad Trainmen*, 302 F. 2d 545 (7th Cir. 1962), which held that if the Norris-LaGuardia Act prohibits the granting of an injunction below it also prohibits the granting of an injunction pending appeal. We are no longer of the opinion that the *Elgin* case is the correct interpretation of the Norris-LaGuardia Act as it applies to injunctions pending appeal and overrule our decision in *Elgin*. While it may be argued that our decision upholding the district court's denial of a preliminary in-

junction because of the non-justiciability of § 2, First, (see pp. 10-16 *infra*) moots the question of whether the district court erred in granting an injunction pending appeal, the necessity of an explanation of our inconsistent action in our December 19, 1969, order maintaining the injunction pending an expedited appeal and the realization that the continued adherence to an incorrect opinion could cause irreparable harm for many years before the case comes before this court in a technically correct posture, persuades us that the question is not moot but should at this time be decided.

We hold that the Norris-LaGuardia Act does not prohibit the district court from granting an injunction pending appeal even though the court determines that Norris-LaGuardia prohibits an injunction below. The power of a district court to grant an injunction to maintain the status quo pending appeal was first codified by the "All Writs Act" contained in the Judiciary Act of 1789, 28 U.S.C. § 1651. In *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S. 4 (1942), the Supreme Court in upholding this power stated:

> It has always been held, therefore, that as a part of its traditional equipment for the administration of justice, a federal court can stay enforcement of a judgment pending the outcome of an appeal.
> *Id.* at 9-10.

See also Hovey v. *McDonald*, 109 U.S. 161 (1883). Absent the prohibitions of the Norris-LaGuardia Act, the law is established that even if a district court determines it lacks jurisdiction to grant an injunction pending appeal, it has the power to preserve appellate review of its determination that it lacked jurisdiction. *See United States* v. *Shipp*, 203 U.S. 563, 573 (1906); *see also Peltway* v. *American Cast Iron Pipe Co.*, 411 F. 2d 998, 1002-3 (5th Cir. 1969); *Eastern Greyhound Lines* v. *Fusco*, 310 F. 2d 632, 634 (6th Cir. 1962).

In the instant case as in this court's earlier opinion in the *Elgin* case, the injunction pending appeal was issued pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.[8] The Rule itself is not a jurisdictional grant but merely a codification of a district court's power to maintain the status quo pending appeal. In *Elgin*, the court relied on Rule 82 of the Federal Rules of Civil Procedure[9] which provides that the promulgation of the Federal Rules does not expand the district court's jurisdiction, and Rule 65(e)[10] which provides that the Federal Rules "do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee." The *Elgin* court construed Rules 82 and 65(e) as denying the power of the district court to grant an injunction pending appeal pursuant to 62(c) in cases where the Norris-LaGuardia Act

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[8] Rule 62(c) of the Federal Rules of Civil Procedure provides in relevant part:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

[9] Rule 82 provides in relevant part:

> These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of acions therein.

[10] Rule 65(e) provides:

> These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C. § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C. § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

prohibited the granting of an injunction in the district court. The *Elgin* court's application of the three Federal Rules of Civil Procedure is correct only if we begin with the premise that Congress by enacting the Norris-LaGuardia Act intended to limit in labor disputes the inherent power of district courts under the "All Writs Act" to grant injunctions pending appeal. If the Congress did not intend such a limitation on the district court's power, Rule 62(c) can be applied without any conflict with the dictates of Rule 82 and Rule 65(e).

There is nothing in the text of the Norris-LaGuardia Act or in the legislative history surrounding the drafting and enactment of the Act indicating a Congressional intent to remove from the district courts their long-recognized power to grant injunctions pending appeal. To remove from the district courts the power to grant injunctions pending appeal and thus the power to maintain the status quo in all cases where the district court has decided that the Norris-LaGuardia Act prohibited an injunction is to in effect make the district court the court of last resort on these matters regardless of the difficulty or novelty of the issues involved. In the absence of any specific Congressional intention to remove the power of district courts to grant injunctions pending appeal, we decline to read into the Act such a serious limitation into the judicial review process.

The United States Supreme Court in *United States* v. *United Mine Workers,* 330 U.S. 258 (1947) supports our decision. The question before the district court in United Mine Workers involved the applicability of the Norris-LaGuardia Act so as to bar the United States from securing an injunction against a strike by United Mine Workers. The district court granted a temporary restraining order which the Union did not obey and the district court found the Union officers to be in contempt. The Supreme Court affirmed the judgment of contempt, finding the Norris-

LaGuardia Act inapplicable. The Court went on to hold, however, that even if Norris-LaGuardia applied, the district court still had the power to preserve the status quo while it decided the underlying jurisdictional issue posed by Norris-LaGuardia:

> In these circumstances, the District Court unquestionably had the power to issue a restraining order for the purposes of preserving existing conditions pending a decision upon its own jurisdiction. 330 U.S. at 290.

While it is true that *United Mine Workers* involved a temporary restraining order and not as the case at bar an injunction pending appeal, both cases deal with difficult questions of jurisdiction. We read the Supreme Court's holding in *United Mine Workers,* that despite the prohibitions of Norris-LaGuardia the district court has inherent injunctive power to grant a temporary restraining order to preserve the status quo while deciding difficult or novel questions determining its own jurisdiction, as support for the proposition that the district court, despite Norris-LaGuardia, also has the inherent power to grant an injunction pending a review of its determination of these jurisdictional issues.

The reasoning of Justice Frankfurter in his concurring opinion in *United Mine Workers* would seem to accept our analysis and its extension to this case. Although Justice Frankfurter was of the opinion that the Norris-LaGuardia Act prohibited permanent injunctive relief in the factual situation, he concurred in the majority's result on the basis that the Norris-LaGuardia Act did not bar interim injunctive relief necessary to preserve the status quo while the court decided the jurisdictional question and while that district court jurisdictional determination was being reviewed by the appellate court:

> To suggest that the right to determine so complicated and novel an issue could not be brought within the

> cognizance of the district court, *and eventually of this court,* is to deny the place of the judiciary in our scheme of government. 330 U.S. at 310 [emphasis supplied].

Although this issue has not been discussed in depth by other courts of appeals, the circuits which have been faced with the problem of district court injunctions pending appeal in a labor dispute have acted consistently with our decision in this appeal. See *Missouri-Kansas-Texas RR. Co.* v. *Brotherhood of Railroad Trainmen,* 342 F. 2d 298 (5th Cir. 1965); *Texas and N.O. RR. Co.* v. *Brotherhood of Railroad Trainmen,* 307 F. 2d 151, 153, 163 (5th Cir. 1962); *Pan-American World Airways* v. *United Brotherhood of Carpenters,* 324 F. 2d 217 (9th Cir. 1963); the district court, though denying a preliminary injunction, granted a 10-day stay to preserve the status quo pending appeal to the Court of Appeals); *Norfolk & P.B.L. RR. Co.* v. *Brotherhood of Railroad Trainmen,* 248 F. 2d 34 (4th Cir. 1957; the district court ordered the temporary injunction dissolved, though by supplemental order, the execution of the court's judgment was suspended pending appeal by the carrier).

While we are cognizant of the purposes of the Norris-LaGuardia Act to remove the injunctive power of the judiciary from the field of labor disputes, we are also mindful of the necessity of judicial review to our legal system. In the absence of a specific Congressional directive, we strike the balance in favor of maintaining the status quo to allow time for a meaningful judicial review.[11, 11a]

---

[11] We also reject the appellant Union's contention that the district court abused its discretion in granting the injunction pending appeal. We find no such abuse. Nor do we find the form of the injunction issued pending appeal improper.

[11a] Since this opinion overrules *Elgin J. & E. Ry. Co.* v. *Brotherhood of Railroad Trainmen,* 302 F. 2d 545 (7th Cir. 1962), we have circulated it to the full active court. No judge has requested a hearing *en banc.*

We now come to the Railroad's appeal in No. 18145 from the decision of the court below that § 2, First, of the Railway Labor Act (45 U.S.C. § 152) is non-justiciable. We are of the opinion that § 2, First, does not contemplate judicial enforcement of its "reasonable effort" requirement and, therefore, affirm the decision of the district court judge.

We construe § 2, First, as a statement of the purpose and policy of the subsequent provisions of the Act and not as a specific requirement anticipating judicial enforcement.

> Nor does § 2 Second make justiciable what otherwise is not. . . . But § 2, Second like § 2, First merely states the policy which those other provisions buttress with more particularized commands. *General Committee of Adjustment of the Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Company*, 320 U.S. 323, 334 (1943).

To imply judicial enforcement to § 2, First, would insert a judicial inquiry into every step of the Railway Labor procedures to determine in each case if reasonable effort is being exerted; this is a role which we believe Congress did not intend the courts play in the settlement of Railway disputes.

In *General Committee* v. *M.-K.-T. RR. Co., supra*, the Supreme Court in deciding certain questions of representation under the Railway Labor Act were not justiciable stated:

> In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this raliway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery

> and involved the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been small, it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. *The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.*
>
> *Id.* at 332-33. [emphasis supplied].

Later in its opinion the Court reiterated:

> [T]he conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else is left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability. *Id.* at 337.

We believe that § 2, First, was intended to play an integral part in facilitating the other more specific procedures of the Railway Act: "The heart of the Railway Labor Act is the duty, imposed by § 2 First upon management and labor. . . ." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969). However, we find that the role of determining whether "reasonable effort" is being practiced by the parties is not a judicial one but a role which should be left to the National Mediation Board.

Under the procedures of the Act, the National Mediation Board plays the dominant role in major disputes within the framework of the Act. Section 6 of the Act provides:

> [I]n every case . . . where the services of the Mediation Board have been requested by either party or

said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by § 5 of this Act, by the Mediation Board.

Section 5 provides in pertinent part that after the services of the Board are invoked or proffered:

> [S]aid Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.
>
> If arbitration at the request by one or both parties shall be refused, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under § 10 of this Act, no change shall be made in the rates of pay, rules or working conditions or established practices in effect prior to the time the dispute arose.

Thus it can be seen that the Mediation Board plays a pivotal role in the workings of the Act. It maintains the status quo, attempts to bring about a voluntary settlement between the parties, tries to induce the parties to submit to arbitration after a determination that voluntary settlement cannot be reached, and then in effect, if § 10 and the Emergency Board are not appropriate, the Mediation Board after a thirty-day period releases its hold on the status quo.

We believe this integral role of the Mediation Board requires it and not the judiciary to enforce compliance with § 2, First. The Mediation Board is certainly better qualified to determine if the parties are exercising reasonable effort in settling their dispute. If the Mediation Board is of the opinion that one of the parties is not negotiating in good faith, it may simply retain jurisdiction over the mediation process until it believes good faith is being exercised. The Act provides that while the Board retains jurisdiction the parties must maintain the status quo. The Board can refuse to certify that "its mediatory efforts have failed" and thus prevent the exercise of self-help until it is satisfied that its mediatory efforts had a chance to fail, *i.e.*, that the parties were bargaining in good faith. Mediation cannot fail if it never had a chance to succeed.[12]

Instead of involving the federal courts in the determination of whether a reasonable effort had been exercised, after all the procedures of the Act have been completed, it seems much more efficient and sensible to allow the Mediation Board while the Act's procedures are being carried out to determine if a reasonable effort is being exercised by the parties. To allow the Mediation Board rather than the courts to perform this function removes the courts from having to issue injunctions in labor disputes (because § 2, First, had not been complied with), thus avoiding conflict with the dictates and policy of the Norris-LaGuardia Act. In addition, a judicial enforcement of § 2, First, would also require the federal courts to remand the dispute back to a certain stage in the procedures of the Act where one party was not bargaining in good faith. We find no ma-

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[12] Of course, if one party is not negotiating in good faith as a dilatory tactic to prevent the other party from eventually exercising self-help, the Board can decide to release jurisdiction of the dispute and allow the procedures of the Act to be exhausted in order to allow for self-help.

chinery nor guidelines in the Act which would aid the court in making this difficult determination.

We are mindful that the role of the Mediation Board is basically a non-adjudicatory one, *see e.g., Detroit & Toledo Shore Line Railroad Company* v. *United Transportation Union*, ... U.S. ..... (Dec. 9, 1969, Slip Opinion, page 17). However, we recognize that for the procedures of the Act to be effective, the Mediation Board must accept in certain instances a limited "quasi adjudicatory" posture. Certainly the authority conferred on the Board pursuant to § 2, Ninth [13] (45 U.S.C. § 152, Ninth), to determine the

[13] 45 U.S.C. § 152, Ninth, provides:

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

proper representatives of the employees can be considered adjudicatory or quasi adjudicatory in nature. Similarly, we interpret § 2, First, to confer on the Board pursuant to its express mediatory power, the power, whether it may be considered adjudicatory or quasi adjudicatory, to make sure the parties are exercising every reasonable effort. We do not feel this limited power under § 2, First, will significantly impair the Board's impartial job as a mediator.

We find that the expertise, proximity to the negotiation process and power to maintain the status quo of the Mediation Board make it singularly well suited to implement the Congressional intent and purpose behind the inclusion of § 2, First. While we agree that the procedures of the Act are purposely long and drawn out in order for the parties to reach agreement and prevent invocation of self-help, we are of the opinion that the tacking on of judicial review after a completion of the Act's procedures does nothing but involve courts in intricate factual questions of intent while unreasonably postponing the parties' right to self-help.

The Railway places great reliance that § 2, First, is justiciable upon the Supreme Court's decision in *Virginia Ry.* v. *System Federation,* 300 U.S. 515 (1937). In *Virginia Ry.,* the railroad had refused to engage in collective bargaining with the Federation after the National Mediation Board, acting under § 2, Ninth, of the Railway Act, determined and certified the Federation to be the representative of the shop craft employees for collective bargaining with the railroad. The Supreme Court upheld a district court injunction which required the railroad to recognize and bargain with the Federation despite the railroad's argument that § 2, Ninth, was not justiciable. While the injunction also required the railroad to make every reasonable effort to settle disputes with the Federation thus

in fact invoking the dictates of § 2, First, the opinion did not state nor imply that whether reasonable effort is in fact complied with by either party was a question for the courts to answer. The Supreme Court did not suggest that the district court retain jurisdiction to determine if the parties were negotiating in good faith, nor did it suggest a further judicial proceeding if conferences between the railway company and the Federation failed. Thus while *Virginia Ry.* holds that § 2, Ninth, contemplates judicial enforcement of the requirement to bargain with the Board's accredited employee representative, it does not hold that judicial enforcement is available to determine whether the parties are in fact negotiating in good faith. As we read *Virginia Ry.*, it allows for judicial enforcement of the specific dictates of § 2, Ninth, and simply provides that when the carrier and the employees' representatives are negotiating they should be guided by the other provisions of the Railway Labor Act including § 2, First.

In addition, to *Virginia Ry.*, the railway also relies on a recent decision by the Fourth Circuit in *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n Int'l*, 416 F. 2d 633 (4th Cir. 1969) (petition for cert. filed, 38 U.S. L.W. 3241, Jan. 6, 1970, No. 995), in which the court upheld a district court injunction against a threatened strike. The court in a holding opposite to our conclusions found:

> Restraining the parties from self-help through strikes or otherwise, until they have complied with the duty to bargain in good faith vindicates the Congressional purpose of providing machinery to prevent strikes without creating an irreconcilable conflict with the Norris-LaGuardia Act. *Id.* at 636.

and thus held § 2, First, to be justiciable. We cannot agree with the Fourth Circuit decision. The machinery to prevent strikes which was the Congressional purpose in enact-

ing the Railway Labor Act is contained within the procedures of the Act and not outside it in the injunctive power of the federal courts. We believe that the provisions of the Act and the powers of the National Mediation Board can enforce the duty to bargain in good faith without the need of judicial interference.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Friday, March 6, 1970

Before: HON. LUTHER M. SWYGERT, *Chief Judge*, HON. THOMAS E. FAIRCHILD, *Circuit Judge*, HON. OTTO KERNER, *Circuit Judge*.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 18109, 18145

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, *Plaintiff-Appellee, (Cross-Appellant)*,

v.

UNITED TRANSPORTATION UNION, *Defendant-Appellant, (Cross Appellee)*.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the decision of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that there be no recovery of costs between the parties to these appeals.

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 69 C 2401

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation, *Plaintiff*,

v.

UNITED TRANSPORTATION UNION, a voluntary, unincorporated labor association, *Defendant*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on to be heard on plaintiff's verified complaint as amended; defendant's motion to vacate the temporary restraining order; plaintiff's motion for preliminary injunction and defendant's motion to dismiss; the first and second defenses in defendant's verified answer and, the Court having heard the evidence, considered the briefs of the parties and heard the arguments of counsel with respect thereto, and being fully advised in the premises, makes the following findings of fact and conclusions of law:

1) Plaintiff is now and was at all times herein mentioned a corporation, as were and are other railroads with which it has merged and which it controls, and is engaged in the business of transporting persons and property by rail in interstate commerce in the Eastern Division of the Eastern Judicial District of Illinois and elsewhere in the State of Illinois and other states of the United States and is a "carrier" within the meaning of and subject to the Railway Labor Act, 45 USC 151 *et seq.*

2) Defendant is a voluntary, unincorporated labor association, the successor to the Brotherhood of Railroad Trainmen, the Switchmen's Union of North America and

other voluntary, unincorporated labor associations and is, as were its predecessors the "representative" under the Railway Labor Act, *supra,* of employees of plaintiff and the corporations with which it has merged and which it controls, hereinafter "Defendant" and is engaged in business as such "representative" in the Eastern Division of the Northern Judicial District of Illinois and elsewhere in the State of Illinois and other states of the United States.

3) The jurisdiction of the Court is invoked by plaintiff under 45 USC §§ 1331 and 1337 as an action arising under the constitution and laws of the United States in which the amount in controversy exceeds $10,000.00 exclusive of interest and costs and as an action under the Railway Labor Act, 45 USC 151 *et seq.*, an Act of Congress regulating commerce, particularly Section 2 First, 45 USC 152 First, thereof.

4) Plaintiff seeks an injunction against a strike and picketing of plaintiff by defendant over a dispute between plaintiff and defendant with respect to whether plaintiff shall have the unrestricted right to determine number and craft of persons to be employed in crews in trains and yard service or whether a specified minimum number of persons shall be employed in such crews; the ground for plaintiff's action is that defendant has not complied with Section 2 First, of the Railway Labor Act, *supra,* which provides that it shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

5) Defendant denies that Section 2 First of the Railway Labor Act is justiciable and denies that the Court has

jurisdiction under the Norris-LaGuardia Act, 29 USC 101, *et seq.*, particularly Sections 4, 7 and 8 thereof, to issue the injunction sought by plaintiff; the requirements of the Railway Labor Act with respect to the dispute between plaintiff and defendant having been exhausted.

6) In July 1965, defendant served a notice on plaintiff and at about the same time on other railroads, under the provisions of Section 6 of the Railway Labor Act, 45 USC 156 of its desire for a collective agreement with plaintiff to be effective January 25, 1966 at the expiration of the Award of Arbitration Board No. 282 which had been established under and in pursuance of Public Law 88-108, 45 USC 157 (1969 Supp.) for a specified minimum number of persons to be employed by plaintiff in crews in train and yard service.

7. Plaintiff, like other railroads on which defendant served the aforementioned notice, refused to negotiate with defendant with respect thereto on the ground it was not required by the Railway Labor Act to do so because the notices were served during the effective period of the Award of Arbitration Board No. 282. Whereupon, defendant requested the National Mediation Board to assume jurisdiction of the dispute arising from such notice and the National Mediation Board did assume jurisdiction thereof in October 1965.

8. In December 1965 plaintiff, as did other railroads, served a notice on defendant under the provisions of Section 6 of the Railway Labor Act, 45 USC 156 of its desire for a collective agreement with plaintiff for the railroad to have the unrestricted right to determine the number and the craft of persons to be employed in crews in train and yard service and further proposed that such notice be handled concurrently with the notice theretofore served on it by defendant in July 1965 and that, if no agreement should be reached by plaintiff and defendant with respect to such notices, the dispute arising therefrom be further

handled under the Railway Labor Act in conjunction and concurrently with disputes between defendant and other railroads arising from similar notices served at about the same time. Such notice was served and such proposals were made by plaintiff and by other railroads expressly subject to the position that it was not required by the Railway Labor Act to negotiate with defendant with respect to the notice served by defendant on plaintiff in July 1965.

9. In January 1966, plaintiff and defendant met with respect to the notice and proposals served in December 1965 by plaintiff upon defendant. No agreement was made. Defendant refused to negotiate concurrently with plaintiff with respect to the notice served by defendant on plaintiff in July 1965. Defendant further refused to negotiate both of said notices in conjunction each with the other or with disputes between defendant and other railroads arising from similar notices served at about the same time. Plaintiff refused to negotiate with defendant independently of similar disputes between defendant and other railroads.

10. Thereafter plaintiff requested the National Mediation Board to, and it did, assume jurisdiction of plaintiff's dispute with defendant arising from the notice served by plaintiff on defendant in December 1965, as did other railroads, with respect to disputes between them and defendant arising from similar notices served by them on defendant in December 1965.

11. From time to time from January 1966 until June 1969, plaintiff and defendant conferred with respect to the dispute arising from the aforementioned notices served by and upon plaintiff and defendant in 1965 but made no agreement settling the dispute.

12. On October 16, 1969, after a proffer by the National Mediation Board to the parties to submit the dispute arising from their aforementioned notices to arbitration was accepted by plaintiff but declined by defendant, the Na-

tional Mediation Board notified the parties that "it is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement", and terminated its jurisdiction of the aforementioned dispute between plaintiff and defendant effective that date.

13. The President of the United States has not established an emergency board to investigate the dispute between the parties hereto arising from their respective 1965 notices heretofore mentioned.

14. The evidence shows that at all times the defendant has taken the position that the only agreement that could be reached was and is that reached by nearly all of the railroads in the United States with defendant, which requires a restoration of approximately 95% of all of the jobs in question.

15. The court does not find as a matter of fact that either of the parties have been guilty of bad faith in bargaining but finds the question of good faith is delegated to the National Mediation Board and has been resolved and is not an issue before this court.

Conclusions of Law

1. This action arises out of and involves a labor dispute within the meaning of the Norris-LaGuardia Act, 29 USC Section 101, *et seq.*

2. Whether there has been compliance with Section 2 First of the Railway Labor Act, 45 USC 152 First, providing that it shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to com-

merce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof is a matter for administrative determination and has been determined by the National Mediation Board under the provisions of Sections 5 and 6 of the Railway Labor Act, 45 USC 155, 156, is not justiciable and this Court does not have jurisdiction to consider or adjudicate disputes with respect to compliance with such subsection, particularly after the National Mediation Board has relinquished its mediatory jurisdiction of a dispute as in this case.

3. The requirements of the Railway Labor Act having been exhausted for more than thirty days with respect to the dispute between plaintiff and defendant arising from the notices served by defendant on plaintiff in July 1965 and by plaintiff on defendant in December 1965 with respect to the number and craft of persons to be employed by plaintiff in its train and yard crews, the Court did not and does not have jurisdiction under the provisions of Sections 4 and 7 of the Norris-LaGuardia Act, 29 USC 104, 107, to issue an injunction, either temporary or permanent against defendant striking and picketing plaintiff as sought by plaintiff herein.

4. Defendant is entitled to receive from plaintiff recompense for loss, expense or damage sustained by defendant as a result of the issuance of the temporary restraining order on November 19, 1969 including all reasonable costs in the defense of such order and in opposing the injunction sought by plaintiff in this proceeding.

5. Defendant's motion to vacate the temporary restraining order heretofore issued should be denied as the question is moot; plaintiff's motion for preliminary injunction should be denied; defendant's motion to dismiss plaintiff's complaint should be allowed, and an appropriate decree should be entered for such purposes.

FINAL DECREE

This cause coming on to be heard on the verified complaint of the plaintiff filed herein on November 20, 1969 as amended; on plaintiff's motion for a preliminary injunction; on defendant's motion filed November 21, 1969 to vacate the temporary restraining order issued herein on November 19, 1969 which was once extended by an order of the Court and thereafter by agreement of the parties until 6:00 p.m., December 12, 1969 and on plaintiff's motion for a preliminary injunction and defendant's motion to dismiss which are part of defendant's verified answer filed herein on December 2, 1969, and

The Court having heard and considered the testimony and written evidence offered by plaintiff in support of its motion for a preliminary injunction and by defendant in opposition thereto and in support of its motions to vacate the temporary restraining order, and to dismiss the complaint and action on December 2, 3, 4 and 5, 1969 and having heard and considered the briefs submitted by and the arguments of counsel and

The Court having tried the action upon the facts without a jury and having heretofore specially found the facts and separably stated its conclusions of law thereon and having directed the entry of an appropriable [sic] decree, it is

ORDERED, ADJUDGED and DECREED that:

1. Defendant's motion to vacate the temporary restraining order issued November 19, 1969 against a strike by defendant is denied, the question now being moot.

2. Plaintiff's motion for preliminary injunction is denied.

3. The plaintiff shall recompense, and pay to, the defendants herein their loss, expense, or damage caused to the defendants by the issuance of the Temporary Restraining Order herein on November 19, 1969 including all reasonable costs and expense of defense against the order

and against the granting of injunctive relief sought in this proceeding and subsequently denied by this Court. For the purpose of determining the amount thereof, this Court reserves jurisdiction of this cause for this purpose only. Hearing thereon will be set upon motion when time for appeal has passed. If appeal is taken, hearing will be set after final mandate herein.

4. Subject to the jurisdiction reserved in the preceding paragraph, defendant's motion to dismiss the complaint is allowed and the complaint and this action is dismissed at plaintiff's cost.

ENTER:

/s/ J. S. PERRY
United States District Judge

Dated: Chicago, Illinois,
December 11, 1969.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is not reported; it appears as Appendix C (pp. 22a-29a) to the Petition. The opinion of the Court of Appeals for the Seventh Circuit appears as Appendix A, (pp. 1a-20a) to the Petition and is reported at 422 F. 2d 979.

JURISDICTION

The jurisdictional requisites adequately appear in the Petition.

QUESTION PRESENTED

Whether, after the procedures required by Sections 5 and 6 of the Railway Labor Act, 45 USC 155, 156, with respect to a dispute between a railroad and the representative of its employees over a proposed change in their collective agreement for notice of the proposed change, negotiation and mediation by the National Mediation Board have been exhausted, a justiciable issue exists under the provisions of Section 2, First of the Railway Labor Act, 45 USC 152, First, with respect to whether a party to the dispute made every reasonable effort to settle it in negotiation and mediation, notwithstanding the absence of any provision of the Railway Labor Act for judicial determination of such issue as a condition to the exercise of self-help by such party after and notwithstanding exhaustion of the procedures required by the Railway Labor Act.

STATUTES INVOLVED

The provisions of the Transportation Act of 1920, ch. 91, Title III, § 301, 41 Stat. 456; the Railway Labor Act of 1926, ch. 347, §§ 2, First, 2, Second, 2, Third and § 5, First, 44 Stat. 577; the Norris-LaGuardia Act of 1932, ch. 90, §§ 4, 7, 47 Stat. 70 (now 29 USC, §§ 29 USC 104, 107); the Railway Labor Act of 1934, ch. 691, §§ 2, First, Second, Third, Fourth, Ninth and 5, First, 48 Stat. 1185 (now 45 USC 152 First, Second, Third, Fourth, Ninth and 155 First), *amending* the Railway Labor Act of 1926, 44 Stat. 577; the Labor Management Relations Act of 1947, ch. 120, §§ 2(2), 2(3), 8(a)(5), 8(b)(3), 8(d), 10(b), 10(j), 10(k), 10(l), 61 Stat. 136 (now 29 USC, §§ 152(2), 153(3), 158(a)(5), 158(b)(3), 158(d), 160(b), 160(j), 160(k), 160(l), *amending* Labor Management Relations Act of 1935, 49 Stat. 449 are set forth in Appendix A.

STATEMENT

This case arises in the continuation of a dispute which has existed for more than ten years between Petitioner, the Chicago & North Western Railroad Company, hereinafter "CNW" and Respondent, United Transportation Union, the successor of the Brotherhood of Railroad Trainmen, hereinafter "Union", with respect to the number of persons to be employed in crews (other than engine crews) in train, road or yard service. The dispute has been and continues to be known as the "crew consist" dispute. It has been and is separate from a co-existing dispute involving the employment of firemen on diesel engines.

The dispute commenced on November 2, 1959, when CNW, as one of approximately two hundred railroads, served notices under the provisions of Section 6 of the Railway Labor Act, 45 USC 156, upon each of the five unions which were the representatives under the Railway Labor Act of the railroads' employees in engine, train and yard service, including the Brotherhood of Railroad Trainmen, which was the representative of employees in train and yard service. The railroads' notices proposed, *inter alia*, eliminating every existing requirement for the employment of a stipulated number of persons in train and yard crews and an agreement for management to have unrestricted right to determine the number and craft of persons to be employed in train and yard service crews. (Presidential Railroad Commission Report of February 26, 1962, hereinafter PRC (App. B, pp. 519-21) Transcript, hereinafter Tr., 226-231).

On September 7, 1960, the unions representing train and yard service employees, including the BRT, served upon each of the railroads which had served notice on the union on November 2, 1959, a notice which, as later implemented, proposed an agreement that crews in road

service should consist of not less than a conductor and two trainmen and that crews in yard service should consist of not less than a fireman and two helpers. (PRC p. 534; Tr. 227-228.) These conflicting proposals constitute the "crew consist" dispute.

In pursuance of an agreement between the railroads and the five unions by and upon which the notices were served, the dispute between the representative of each union on each railroad was referred to a committee representing each union and by each railroad to a committee representing all the railroads, to be, as they were, handled collectively and concurrently by such committees on a national basis.

At the request of the parties, the President created the Presidential Railroad Commission on November 1, 1960 to study and report upon the aforementioned crew consist and other proposals contained in the railroads' 1959 and the unions' 1960 Section 6 notices. The PRC made its Report and recommendations on February 28, 1962. (PRC, p. iv; see also *National Mediation Board* (sometimes hereinafter NMB), Twenty-ninth Annual Report, June 30, 1963, p. 14).

Negotiations between the railroads' committee and the unions' committee from February until May 17, 1962, in the light of the Report of the PRC, did not result in an agreement and, on May 21, 1962, the unions invoked the services of the National Mediation Board. Mediation was conducted by the NMB from May 23 to June 22, 1961 but did not result in an agreement resolving the dispute or for arbitration and the NMB terminated its jurisdiction of the dispute on August 15, 1962, notifying the parties that "[i]t is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement", and directing the attention of the

parties to the status quo clause of Section 5 First (b) of the Act. (NMB, 29th Annual Report, 1963, p. 15.)

The unions then filed *Brotherhood of Locomotive Engineers, et al. v. Baltimore & Ohio R. Co., et al. infra,* for an injunction against the railroads' exercise of self-help by putting their November 2, 1959 notices into effect on the ground the railroads' notice of November 2, 1959, proposing the *elimination* of crew consist agreements, was in violation of Section 2, First of the Railway Labor Act which provides that carriers and their employees shall make every reasonable effort *to make and maintain agreements.*

The District Court dismissed the action; the Court of Appeals affirmed, 310 F. 2d 503 (7th Cir., 1962) as did this Court, ruling that the parties were free to exercise self-help subject only to the creation of an emergency board (372 U. S. 284, 291 (1963)).

The railroads, including the CNW, again announced their intention to exercise self-help, as authorized by this Court's decision, and to put their November 2, 1959 proposal into effect on April 8, 1963 and the unions announced they would strike. Thereupon, the President established Emergency Board No. 154 which made its report May 13, 1963 (NMB, 29th Annual Report, June 30, 1963, pp. 15, 51).

Further negotiations were unsuccessfully conducted under the auspices of the Secretary of Labor and the President (NMB, 29th Annual Report, June 30, 1963, pp. 15-16), after which Public Law 88-108, 77 Stat. 132, 45 U. S. C. 157 (1970 Supp.)) was enacted. It prohibited the exercise of self-help by the railroads and unions and required the arbitration of the firemen and crew consist disputes.

Arbitration Board No. 282, which was created pursuant to Public Law 88-108, after conducting hearings, made an award which became effective January 25, 1964.

The award remanded the crew consist dispute to the individual railroads and representatives of the unions on each such railroad for resolution by agreement or by arbitration by Special Boards of Adjustment in accordance with certain guidelines (Pl. Ex. 1, Tr. 27-28).

The validity of the Award was upheld in *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Chicago, Burlington & Quincy R. Co., et al.*, 225 F. Supp. 11 (D. D. C. 1964) in which the court reviewed the developments of the dispute; the Court of Appeals affirmed, *per curiam*, on the basis of the opinion of the District Court, *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Certain Carriers, etc.*, 331 F. 2d 1020 (D. C. Cir. 1964), and this Court denied certiorari, *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Certain Carriers, etc.*, 377 U. S. 918 (1964).

During the two years prior to the expiration of Arbitration Award No. 282 on January 25, 1966, the crew consist dispute was resolved in many instances by agreements between individual railroads and the unions and, on other railroads, by arbitration by Special Boards of Adjustment; the dispute was resolved by agreement on some districts of the CNW and by arbitration on others (Tr. 225-226).

The effect of the agreements and arbitration awards was generally to authorize reduction in the number of persons required to be employed in crews (NMB, 30th Annual Report, 1964, p. 76; 31st Annual Report, 1965, p. 65; 32nd Annual Report, 1966, p. 772; Tr. 225-226).

The unions, taking the position that, upon the expiration of the Award of Arbitration Board No. 282, the crew

consist agreements and practices which were in existence prior to the Award would again be in effect, called upon the railroads to prepare to put these prior agreements and practices into effect on January 25, 1966. Also, in June and July 1965, the unions served notices upon about 170 railroads under the provisions of Section 6 of the Railway Labor Act proposing an agreement to become effective at the expiration of the Award on January 25, 1966 for a minimum crew consist of a conductor and two trainmen in road service and a foreman and two helpers in yard service, which was the same as the notice the unions had served in 1960; the union's notice was served on the CNW July 6, 1965 (Tr. 226-228, 231). The CNW and other railroads upon which the union served the same notice refused to negotiate with the union with respect thereto upon the ground that the notice, having been served during the effective period of the Award of Arbitration Board No. 282, was without legal effect. The unions then invoked the services of the National Mediation Board (Tr. 383).

In December, 1965, the CNW and other railroads served notices on the union which were the same as those served by the railroads in 1959 (Tr. 226-231), proposing an agreement for management to have the unrestricted right to determine the number and craft of persons to be employed in crews. The CNW and other railroads which served the same notice also proposed that the dispute arising from the union's notice and the railroads' notice be handled concurrently by a Committee representing all the railroads and a committee representing the union's representative on each railroad as had been done with respect to the notices served by the railroads in 1959 and by the unions in 1960. The unions did not agree to the railroads' proposal to handle the dispute on a national basis (Tr. 233), whereupon the railroads also invoked the services of the National Mediation Board and urged it to handle the disputes concurrently on a national basis, rather than on a

local basis (Tr. 385-388). The National Mediation Board took jurisdiction of the disputes and proceeded to handle the disputes on a railroad by railroad basis, rather than on a national basis, as urged by the railroads (Tr. 390-391); *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co.*, 383 F. 2d 225, 227 (D. C. Cir., 1967). The CNW and the union had one conference with respect to the crew consist dispute on January 18, 1966 (Tr. 231, 403).

On January 21, 1966, the CNW and other railroads, upon which the union had served notices and which had served notices upon the union (Tr. 391, 393) filed *Akron & Barberton Belt Railroad Company et al. v. Brotherhood of Railroad Trainmen et al., infra*, seeking a declaratory judgment with respect to the rights of the parties subject to the Award of Arbitration Board No. 282 after the expiration thereof and for an anti-strike injunction. On May 19, 1966, the District Court held that Section 6 notices served during the effective period of Arbitration Award No. 282 would become effective on January 25, 1966, after which full fledged conferences must be held to satisfy the requirements of the Railway Labor Act, but declined to issue any order interfering with proceedings of the NMB (254 F. Supp. 306, D. D. C. 1966).

Thereafter the CNW and the Union conferred with respect to the dispute arising from their notices on June 28, 1966 and again in August, 1966 (Tr. 233-234, 403).

While appeals from the judgments of the District Court in *Akron & Barberton Belt* were pending, the National Mediation Board, on October 4, 1966, terminated its jurisdiction over disputes which arose from crew consist notices served in 1965 by the union on the Atlantic Coast Line Railroad Company, the Boston & Maine Railroad Company and the Des Moines Union Railroad Company and

by those railroads on the unions, which were substantially the same as the notices served by and upon the CNW and the union in 1965 (Tr. 396-398).

On November 1, 1966, those railroads instituted *Atlantic Coast Line Railroad Company et al. v. Brotherhood of Railroad Trainmen*, in the U. S. District Court for the District of Columbia, seeking a declaratory judgment that the union had not exhausted the requirements of the Railway Labor Act because it had refused to agree to national handling of the disputes which arose from the Section 6 notices served by the union in June and July 1965 and by the railroads in December, 1965, and that the unions had not bargained in good faith as required by Section 2, First of the Railway Labor Act.

On May 12, 1967, the Court of Appeals for the District of Columbia Circuit decided *Brotherhood of Railroad Trainmen et al. v. Akron & Barberton Belt R. Co. et al.*, 385 F. 2d 581, affirmed, in part, and reversed, in part, the District Court's decision as shown, *infra*.

On September 6, 1967, the Court of Appeals for the District of Columbia Circuit decided *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co.*, 383 F. 2d 225, reversing the decision of the District Court, as shown, *infra*.

During the period from the initiation of the *Atlantic Coast Line* suit in October, 1966 until after both the *Akron & Barberton Belt* and the *Atlantic Coast Line* litigation had been completed—when this Court denied Petitions for Writ of Certiorari in both cases in January, 1968 (389 U. S. 1047 and 390 U. S. 923)—no meetings or conferences were held between the CNW and the unions with respect to the dispute arising from their 1965 notices and the National Mediation Board, which had retained jurisdiction over the CNW crew consist dispute, held the matter in abeyance (Tr. 234).

Following a meeting on March 19, 1968, between the Presidents of the CNW and the Union, the parties engaged in negotiations on May 16, June 12, June 20, July 17, August 6 and 7, 1968 (Tr. 239-240, 243, 244-246, 248-249). No negotiations were conducted from August 7, 1968 until April 22, 1969 because the parties were involved in matters connected with a merger of the CNW and other railroads (Tr. 254-255). Further negotiations occurred on April 22 and 30, 1969, May 9 and 15, 1969 (Tr. 254, 256, 260, 263, 268, 270); they were conducted for the Union by numerous General and Local Chairmen and for the CNW by its Vice-President for Labor-Relations, J. R. Wolfe.[1]

The National Mediation Board actively, but unsuccessfully, undertook to mediate the dispute on 8 separate occasions between June 4 and July 2, 1969 (Tr. 275-276, 280, 290, 303-308), and on October 16, 1969, after rejection of a proposal by the National Mediation Board to submit the dispute to arbitration, terminated its jurisdiction over the CNW-UTU "crew consist" dispute (Court of Appeals Opinion, *infra*, p. 5a; Tr. 312; Def. Exhibit 7, Tr. 433), notifying the parties that "[i]t is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement," and directing the attention of the parties to the status quo clause of Section 5 First (b) of the Act (Def. Exhibit 7, Tr. 433).

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[1] CNW Vice-President Wolfe had been intimately involved with the "crew consist" dispute from its beginning in 1959, as one of the Southeastern Railroad's counsel in national labor cases from 1959 to 1964, and as General Attorney and, subsequently, as General Counsel of the National Railway Labor Conference, the national bargaining arm of the railroads, from July, 1964 until election as CNW Vice-President for Labor Relations in April, 1968 (Tr. 218, 219, 376-77, 381, 406). From his election as CNW Vice-President for Labor Relations in 1968, to the time of the filing of this suit, Mr. Wolfe has been personally involved in "crew consist" negotiations involving CNW and the UTU (Tr. 406-08).

Thereafter, the CNW and Union negotiated further and exchanged proposals for the settlement of the dispute for seven consecutive days from November 12 to 19, 1969 without reaching agreement (Tr. 314-318).[2]

On November 19, 1969, CNW commenced this action for a declaratory judgment and for an injunction against a strike by the union over the dispute on the ground the union had not made the "every reasonable effort" contemplated by Section 2, First, of the Railway Labor Act, to make an agreement. The alleged failure of the union was (1) insisting upon handling the dispute with the CNW separately from the same dispute it had with other railroads rather than concurrently with such other disputes on a national basis; (2) refusing to bargain over the number of persons to be employed in main line crews; (3) insisting upon an agreement which would not be more favorable to the CNW than agreements made by the union with other railroads (Complaint, pp. 4-5) as amended November 28, 1928.

The District Court granted a temporary restraining order and CNW filed a motion for a preliminary injunction. The union on December 2, 1969, filed an answer to the CNW's complaint as amended, asserting that the complaint did not state a claim upon which relief could be granted; that the Court lacked jurisdiction under the Railway Labor Act and Norris-LaGuardia Act to grant the relief sought by CNW; that CNW had not, as determined in *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.*, made every reasonable effort to resolve the

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[2] The negotiations between CNW and the union were conducted in the setting of the industry-wide trend of agreements resolving the crew consist dispute of which CNW's J. R. Wolfe had general knowledge and which appear in Defendant's Exhibit 8, Tr. 338-339 and specific knowledge of agreements resolving the crew consist dispute between the union and at least 23 railroads operating in the same areas in which the CNW operates (Tr. 340-343, 371-372).

dispute, that the CNW's claim that the union had violated the Railway Labor Act by insisting upon handling its dispute with CNW separate from the same dispute with other railroads, rather than on a national basis had been judicially resolved against the CNW's contention in *Atlantic Coast Line R. Co. et al. v. Brotherhood of Railroad Trainsmen, infra*, and otherwise denied that it had failed to comply with the Railway Labor Act in its negotiation with the CNW with respect to the dispute.

After hearing evidence, the District Court granted the union's motion to dismiss the action (Ptn. App. C, pp. 22a-29a).

Also, on the same day, the District Court issued an injunction against a strike by the union pending an appeal which is the subject of *United Transportation Union, Petitioner v. Chicago & North Western R. Co., Respondent*, No. 190, now pending in this Court.

On March 6, 1970 the Court of Appeals affirmed the decision of the District Court (Ptn. App. A, pp. 1a-20a, 422 F. 2d 979), concluding that "§ 2, First does not contemplate judicial enforcement of its 'reasonable effort' requirement . . ." (Ptn. App. A, p. 13a); rather the "role of the [National] Mediation Board under the Railway Labor Act requires [that Board] and not the judiciary to enforce compliance with § 2, First" (Ptn. App. A, p. 16a).

SUMMARY OF THE ARGUMENT

The writ of certiorari should not be granted because:

I. The Court below correctly decided that, after the requirements of the Railway Labor Act for notice, conference and mediation by the National Mediation Board have been exhausted, and no Presidential Emergency Board has been

established with respect to a major dispute arising under the Act, Section 2, First, of the Act, which provides that it shall be the duty of carriers and their employees to exert every reasonable effort to make agreements, is not justiciable and does not confer jurisdiction upon the courts to determine (as the National Labor Relations Board has jurisdiction to determine under the Labor Management Relations Act) upon evidence of the conduct of the parties in exhausting those requirements, whether a party to such dispute complied with Section 2, First, of the Act and, depending upon such judicial determination, to permit a party to such dispute to exercise its right of self-help with respect to the dispute or, in the case of a union, to deny the exercise of self-help by an anti-strike injunction until the union, to the satisfaction of the court thereafter, shall have complied with Section 2, First, of the Act by engaging in either re-negotiation or re-mediation by the National Mediation Board or, in a case in which an investigation has been made of the dispute by a Presidential Emergency Board, by re-participating in a re-investigation of the dispute by a re-established Emergency Board.

II. There is no conflict between the decision of the Court below and the decision of the Court of Appeals for any other Circuit or by a District Court on the same matter, but at most only with *obiter dictum* in opinions in other cases or with the fact that a court conducted such proceedings without deciding the question decided by the Court below.

III. The decision of the Court below that the determination of whether the parties to such a dispute have complied with Section 2, First, of the Act should be left to determination by the National Mediation Board rather than by the Courts, does not present an important question of federal law which has not been, but should be, decided by this Court, nor a conflict with any decided case

but is clearly in accord with the long established and accepted view that such is the function of the National Mediation Board under the Railway Labor Act and its decision that all practical methods provided by the Act for adjusting the dispute have been exhausted, should be given the same force and effect as decisions by that Board with respect to what employees constitute a craft or class and the designation of a representative by a majority of such employees and should not be subject to judicial review.

ARGUMENT

I

The Decision of the Court Below Was Correct

Section 2, First of the Railway Labor Act, as amended by the Act of June 21, 1934, c. 691, § 2, 48 Stat. 1185; 45 USC 152, First (App. A-1), upon which Petitioner bases its claim in this case, first appeared in railway labor legislation in substantially the same words as Section 301 of Title III of the Transportation Act of February 28, 1920, c. 91, § 301, 41 Stat. 456 (App. A-1), thereafter in substantially the same words as Section 2 of the Railway Labor Act of May 20, 1926, c. 347, § 2, 44 Stat. 577 (App. A-1). It provides that:

> ". . . It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

It was held not to impose any judicially enforceable obligation upon either the railroads or their employees when it was first considered in *Pennsylvania R. Co. v. United States Railroad Labor Board*, 261 U. S. 72 (1922), in *Pennsylvania Railroad System & Allied Lines Federation No. 90 v. Pennsylvania R. Co.*, 267 U. S. 203 (1925) and in *Brotherhood of Railway & Steamship Clerks v. Pennsylvania R. Co.*, 267 U. S. 219 (1925).

The use of company unions by the railroads contributed to the strike in 1922 by the shop craft employees which

developed into a national strike of not only shop craft employees but employees in other crafts, contributed to the failure of the Transportation Act of 1920 and the enactment of the Railway Labor Act of 1926. L. Lecht, *Experience under Railway Labor Legislation*, BNA, 1969, pp. 43-46.

Section 2 of the Railway Labor Act of May 20, 1926, c. 347, § 2, 44 Stat. 577, was substantially the same as Section 301 of the Transportation Act of 1920 (App. A-1) but the Railway Labor Act of 1926 added Section 2, Third (App. A-2) to provide that:

> "Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

The Railway Labor Act of 1926 was considered by this Court in *Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548 (1930). In that case, the railroad caused a company union, the "Association of Clerical Employees-Southern Pacific Lines" to be organized and to cause its clerical employees to substitute it for the Brotherhood as their representative; at that time a wage dispute between the railroad and the Brotherhood was subject to the jurisdiction of the Mediation Board. Thereafter the Railroad refused to deal with the Brotherhood, claiming it did not represent a majority of the clerical employees. The Brotherhood sued for an injunction prohibiting the Railroad from interfering with, influencing or coercing its clerical employees in the matter of their organization and designation of representatives in

violation of Section 2, Third of the Act. The Railroad's contention, based on the *Pennsylvania Railroad* cases, that the Act provided no judicially enforceable duty was rejected by this Court stating (281 U. S. at 567-568):

> "It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings. The question before us is whether a legal obligation of this sort is also to be found in the provisions of subdivision third of Section 2 of the Act, . . ."
>
> *"It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules, and working conditions, and to settle disputes with all expedition in conference between authorized representatives, but added this distinct prohibition against coercive measures. . . ."*

Thus, this Court continued to regard "the general declaration [in Section 2, First and Section 2, Second] of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes with all expedition in conferences between authorized representatives" which it held in the *Pennsylvania Railroad* cases, was not a judicially enforceable duty and was different from the *distinct prohibition* of Section 2, Third which it held judicially enforceable and thus laid the foundation for determining what provisions of the Railway Labor Act are justiciable and judicially enforceable as it more fully stated later in *General Committee of Adjustment v. Missouri-Kansas R. Co., infra.*

The jurisdiction of courts with respect to granting injunctions in Railway Labor Act disputes became subject to the Norris-LaGuardia Act of March 23, 1932, c. 90, §§ 4 and 7, 47 Stat. 70, 29 USC 104, 107 (App. A-2-4). While Section 4 of that Act withdrew the general jurisdiction of courts to issue anti-strike injunctions in labor disputes, Section 7 of the Act authorized such an injunction in a case in which ". . . unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained . . ."

In *Chicago, Rock Island & Pacific R. Co. v. Switchmen's Union of North America*, 292 F. 2d 61 (2d Cir. 1961); *cert. den.* 370 U. S. 936 (1962), discussed in detail *infra*, the court questioned whether a violation of Section 2, First of the Railway Labor Act could constitute an "unlawful act" within the meaning of Section 7 of the Norris-LaGuardia Act as a basis for granting an anti-strike injunction.

The Railway Labor Act of 1926, as amended on June 21, 1934, c. 691, § 2, First, Third, Fourth, Ninth, 48 Stat. 1185, 45 USC 152, First, Third, Fourth, Ninth (App. A-4-7) was re-enacted in substantially the same words as Section 301 of the Transportation Act of 1920 as was Section 2, First of the 1926 Act. Section 2, Third was amended and Section 2, Fourth (45 USC 152, Fourth) was added to more plainly prohibit company dominated unions and Section 2, Ninth was added to provide for the National Mediation Board to determine what employees constitute a craft or class and to determine whether the craft desires a representative for the purposes of the Act and if so the representative selected by the majority of the craft and to require the Railroad to recognize and deal with such representative.

The first case considered by this Court involving the Norris-LaGuardia Act and the 1934 amendments of the

Railway Labor Act was *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515 (1937).

In that case the Railway had engaged in collective bargaining and entered into a collective agreement with a company union, the "Mechanical Department Association of the Virginian Railway" as the representative of its shop craft employees who theretofore had been represented by Federation No. 40, an affiliate of the American Federation of Labor.

In pursuance of Section 2, Ninth, of the Railway Labor Act, the National Mediation Board conducted an election by the shopcraft employees and certified the Federation as the representative of the employees in certain crafts, while refusing to meet with the Federation and maintaining its agreement with the "Mechanical Department Association". The Railway established and furthered the efforts of another company union, the "Independent Shop Crafts Association of the Virginian Railway" to become the representative of its shop craft employees.

The Federation sued for an injunction to require the Railway to "treat with" it as provided by Section 2, Ninth of the Act and to prohibit it from interfering, in violation of Section 2, Third and Fourth of the amended Act, with the right of the employees to organize, designate and choose a representative and bargain collectively through their chosen representative. The District Court issued an injunction prohibiting the Railway from interfering with its employees' selection of a representative by further fostering, encouraging, promoting or dealing with either of the Associations or any other organization and, in the words of Section 2, Ninth, required the Railway to recognize and "treat with" the Federation and, in the words of Section 2, First, to exert and make every reasonable effort to make and maintain an agreement with the Federation.

The Railway contended that the requirement of the injunction for it to "treat with" the Federation and to "exert every reasonable effort to make and maintain agreements" with the Federation was without legal sanction because the same requirement was stated in the same words in Section 301 of the Transportation Act of 1920 and was held to be without legal sanction in *Pennsylvania R. Co., System & Allied Lines Federation No. 90 v. Pennsylvania R. Co., supra.* This Court rejected that argument (300 U. S. 544-545) saying:

> ". . . But these words no longer stand alone and unaided by mandatory provision of the statute as they did when first enacted. The amendment of the Railway Labor Act added new provisions in Section 2, Ninth which . . . commands that 'upon receipt of such certification [by the Mediation Board, of the representative of the employees] the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act [chapter].' It is, we think not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer and that its command, in a proper case, be enforced by the courts."

It is apparent that the "mandatory requirement" which this Court enforced was that of Section 2, Ninth, not Section 2, First, which as this Court stated later in *General Committee of Adjustment v. Missouri-Kansas R. Co., infra,* is not justiciable (320 U. S. 323 (1943), *infra*).

The Railway also argued that the requirement of the injunction for it to "treat with" the representative of the employees merely required the employer to meet the authorized representative of the employees only if and when it should elect to negotiate with such representative

but this Court said that the argument disregards the words of Section 2, Ninth and that although the Act does not compel agreement the "command to the employer" to take those preliminary steps without which no agreement could be reached and to "treat with" the authorized representative which, at least, requires the employer to meet and confer with the authorized representative of its employees, to make reasonable effort to compose differences, to enter into negotiation for the settlement of labor disputes such as is contemplated by Section 2, First (300 U. S. at 547).

The Railway also argued that since a court of equity could not compel agreement it should not enter an order to compel the preliminary steps to be taken. The Court also rejected that argument and held the injunction valid. However, the Court did not suggest that if the Railway meet with the Federation and no agreement resulted, there should be further judicial proceedings to determine whether the Railway had exerted every reasonable effort to make an agreement, as contemplated by Section 2, First of the Railway Labor Act and compel compliance therewith. Instead, this Court stated, 300 U. S. at 551-552:

> ". . . Moreover, the resources of the Railway Labor Act are not exhausted if negotiation fails in the first instance to result in agreement. If disputes concerning changes in rates of pay, rules, or working conditions, are 'not adjusted by the parties in conference', either party may invoke the mediation services of the Mediation Board, section 5, First (45 U. S. C. A., § 155, subd. 1), or the parties may agree to seek the benefits of the arbitration provision of section 7 (45 U. S. C. A., § 157). With the coercive influence of the company union ended, and in view of the interest of both parties in avoiding a strike, we cannot assume that negotiation, as required by the

decree, will not result in agreement, or lead to successful mediation or arbitration, or that the attempt to secure one or another through the relief which the district court gave is not worth the effort."

Thus, this Court considers that, if conference fails to produce agreement the next step should be mediation by the National Mediation Board, which this Court considers to be "the antithesis of justiciability" and litigation (*General Committee of Adjustment v. Missouri-Kansas R. Co.*, 320 U. S. 323, at 337, *infra*).[3]

The provisions of Section 5 of the Railway Labor Act as amended in 1934 (cf. Act of May 20, 1926 c. 347, § 5, 44 Stat. 580 (App. A-2), and Act of June 21, 1934, c. 691, § 5, 48 Stat. 1195 (App. A-7)), confirms that mediation, not litigation, is the remedy for the refusal or failure of conferences. Section 5, First (a) and (b) of the Act, now

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[3] In this connection the Court further stated that:

". . . the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability.

In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. . . . Courts should not rush in where Congress has not chosen to tread.

We are concerned solely with legal rights under this federal Act which are enforcible by courts. For unless such a right is found it is apparent that this is not a suit or proceeding 'arising under any law regulating commerce' over which the District Court had original jurisdiction. . . ."

45 USC 155, provide in part that "where conferences are refused" or where a dispute is "not adjusted by the parties in conference" either or both parties to the dispute may invoke the services of the National Mediation Board or the Board may, *sua sponte*, proffer its services.

Also, in connection with the *Virginian* case, *supra*, it should be noted that it was concerned with the jurisdiction of the Courts *prior* to conferences, negotiation, mediation and possibly an investigation and report by a Presidential Emergency Board and was not concerned with whether the Act provides judicial review of the conduct of the parties in exhausting the requirements of the Act *subsequent* thereto.

The decision of the Court of Appeals for the District of Columbia Circuit in *Brotherhood of Railroad Trainmen, et al. v. Akron & Barberton Belt R. Co., et al.*, 385 F. 2d 581 (D. C. C. A. 1967) is in accord, as will appear in more detail *infra*. The District Court in that case had stated that the negotiation contemplated by Section 2, First of the Railway Labor Act would be judicially enforced as a condition precedent to mediation. *See Akron & Barberton Belt R. Co. v. Brotherhood of Railroad Trainmen*, 254 F. Supp. 306, and the Order entered pursuant to that opinion at page 318, Vol. 2 of the Joint Appendix in *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.*, Nos. 20,229, 20,249 in the Court of Appeals for the D. C. Circuit filed in this Court in *Akron & Barberton Belt R. Co. v. Brotherhood of Railroad Trainmen*, No. 863, October Term, 1967, *cert. den.* 390 U. S. 923 and *Akron & Barberton Belt R. Co. v. Order of Railway Conductors*, 253 F. Supp. 538 from which petitioner quotes at pages 11-12 of the petition in this case. The Court of Appeals did not suggest judicial review of the conduct of the parties in conference and judicial enforcement of compliance with Section 2, First as a condition precedent to mediation.

Instead, the Court of Appeals ruled that upon the refusal of the railroads to confer the unions properly advanced the dispute to mediation, 385 F. 2d at 597.

Section 2, First was again considered by this Court in *General Committee of Adjustment v. Missouri Kansas-Texas R. Co.*, 320 U. S. 323 (1943). In that case the Court held the question whether the railroad was required by Section 2, First and Ninth of the Railway Labor Act to deal with the Brotherhood of Locomotive Engineers with respect to the use of firemen as engineers to the exclusion of the Brotherhood of Locomotive Firemen & Enginemen as the representative of the firemen who might be called to work as engineers, not to be justiciable under the Railway Labor Act. In so doing this Court limited the jurisdiction of Courts with respect to the justiciability of and enforcement of provisions of the Railway Labor Act. In so doing, the Court considered and explained its decision in the *Virginian* case, saying 320 U. S. at 333:

> ". . . [a]s we have already pointed out, § 2, Ninth, after providing for a certification by the National Mediation Board of the particular craft or class representative, states that 'the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act.' That command of § 2, Ninth, was enforced in the *Virginian R. Co.* case. But § 2, Second, like § 2, First [which provides that 'it shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise. . . .'], merely states the policy which those other provisions buttress with more particular commands . . ."

Thus, this Court made it plain that, in the *Virginian* case, it held only that the provisions of Section 2, Ninth, were judicially enforceable and did not hold that Section 2, First, which was incorporated in the injunction involved in that case was judicially enforceable.

The only other expression by this Court, upon which petitioner relies, is in a footnote in *Elgin, Joliet & Eastern R. Co., v. Burley*, 325 U. S. 711 (1945) at 721-722 (Ftn. 21). Petitioner's reliance on that statement of this Court is misplaced. The statement was made in rejecting an argument founded upon language in *Moore v. Illinois Central R. Co.*, 312 U. S. 630 at 635-636, that the entire scheme of the Railway Labor Act for the settlement of grievances, including a grievance for wrongful discharge, was "wholly conciliatory in character, involving no element of legal effectiveness, with the consequence that the parties are entirely free to accept or ignore the Board's decision [with respect to disputes submitted to it]. What this Court said in *Burley* was that parties to a dispute to the Railway Labor Act, whether a "major" or "minor" dispute as defined and delineated in *Burley* were subject to "a duty . . . to *negotiate* for . . . settlement [of the dispute]" (emphasis supplied) which was judicially enforceable (325 U. S. at 721, f. n. 12; 729, f. n. 26). That statement lends no support to petitioner's claim in this case, that Section 2, First of the Railway Labor Act confers jurisdiction upon courts to determine, upon evidence of the conduct of parties in negotiation and mediation whether a party made every reasonable effort to settle the dispute and, to permit or deny the exercise of self-help, depending upon such judicial determination by the Court. Also, in the *Burley* case, after outlining the requirements of the Railway Labor Act with respect to major disputes, as this Court did in *Missouri-Kansas-Texas, supra*, 320 U. S. at 327, in which it stated that those requirements were not justiciable (320 U. S. at

337, the Court also held in *Burley* (325 U. S. at 725), that the ". . . compulsions [of the Railway Labor Act] go only to insure that those proceedings are exhausted before resort can be had to self-help."

In considering the prior phase of this crew consist dispute in *Brotherhood of Locomotive Engineers, et al. v. Baltimore & Ohio R. Co.*, 327 U. S. 284 (1963), in which the union's complaint was based on an alleged violation by the Railroads of Section 2, First of the Railway Labor Act, this Court said at 327 U. S. 290: "The only question presented, therefore, is whether the record before us sustains the finding of both lower courts that the parties have exhausted the procedures provided by the Railway Labor Act for major disputes such as that involved here. . . .", and further 325 U. S. at 291, that:

> ". . . both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute, subject only to the invocation of the provisions of § 10 providing for the creation of an Emergency Board. . . .".

This Court uniformly has held, as it did in the *Baltimore & Ohio* case, that after the parties have exhausted the statutory procedures of the Railway Labor Act with respect to major disputes, they are free to exercise self-help and, as the Court of Appeals for the Second Circuit said in *Pan American World Airways, Inc. v. Flight Engineers*, 306 F. 2d 840 (1962) at 846-847, *infra*, that after the procedures of the Railway Labor Act have been exhausted:

> ". . . the Act contemplates that the further progress toward the determination of the controversy will be left entirely to the interplay of economic forces without further governmental intervention . . ."

and that

". . . no injunction can issue under the Act against a strike which is undertaken after the . . . processes of the Act have been completed . . ."

Elgin, J. & E. Ry. Co. v. Burley, et al., 325 U. S. 711, 725 (1945); *Order of Railroad Telegraphers v. Chicago and North Western R. Co.*, 362 U. S. 330 (1960); *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad*, 372 U. S. 284, 290-91 (1963); *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO v. Florida East Coast Railway Co.*, 384 U. S. 238, 243-44 (1966); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369, 378-79 (1969).

II

There Is No Conflict of Decision

Petitioner cites cases decided in the District of Columbia, 2nd, 4th, 5th and 8th Circuits, by the Courts of Appeals for those Circuits and by District Courts in some of them as being in conflict with the decision of the Court below in this case.

While we are mindful that this Court, under its Rule 19(b), is concerned with conflict in decisions by Courts of Appeals on the same matter and slightly, if at all, with a conflict between a decision by a Court of Appeals and a District Court in the same or a different Circuit on the same matter, we shall nevertheless, consider all of the cases cited by petitioner since there is no conflict between the decision of the Court below in this case and the decision by any other Court of Appeals or by a District Court of the question decided by the Court below in the same circumstances of this case.

A

Petitioner relies principally upon a claim that a conflict exists between the decision of the Court below in this case and a decision by the Court of Appeals for the 4th Circuit in *Piedmont Aviation, Inc. v. Air Line Pilots Ass'n.*, 416 F. 2d 633 (1969), *cert. denied,* 90 S. Ct. 924 (1970); hence we will first consider that case and the others decided in the 4th Circuit upon which Petitioner relies.

The decision by the Court below should not be considered to be in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Piedmont Aviation, Inc. v. Air Line Pilots Ass'n., Inc.*, 416 F. 2d 633, on the same matter, notwithstanding the Court below stated (422 F. 2d at 988), that "[t]he Court [of Appeals for the 4th Circuit] in a holding [in the Piedmont case] opposite to our conclusions, found . . . and thus held § 2, First, to be justiciable" and that "[W]e cannot agree with the Fourth Circuit decision" because, as will appear *infra,* the use by the Court below of the words "holding", "held" and "decision" were an obvious inadvertent misinterpretation of the *Piedmont* case.

The only *decision* which the Court of Appeals for the Fourth Circuit made in *Piedmont* was that the preliminary injunction against a strike by the pilots, which was conditioned upon *Piedmont* maintaining the *status quo ante,* should be continued pending further consideration of the case by the District Court and that the first question which the District Court should decide was with respect to its jurisdiction to decide the case on its merits by determining whether the dispute between Piedmont and the pilots was a minor dispute which the Court should not decide (416 F. 2d at 639-640).

That part of the opinion in *Piedmont* with which the Court below disagreed in this case—(422 F. 2d at 988;

App. A, p. 19a) (Ptn. 9)—that Section 2, First of the Railway Labor Act was justiciable subsequent to exhaustion of the requirements of the Railway Labor Act for conference and mediation—was stated by the Court of Appeals for the Fourth Circuit to have been upon the *assumption* that the controversy was a major dispute as to which there had been "no judicial inquiry of its aptness" (416 F. 2d at 639).

If the dispute is determined to be a minor dispute, the courts in the Fourth Circuit will not ever decide, in the *Piedmont* case, the question which was decided in this case by the Court below and what the Fourth Circuit Court of Appeals said in *Piedmont* which conflicts with this decision by the Court below in this case, will forever remain what it is now—*obiter dictum* and not a *decision.*

It may well be that if the dispute in *Piedmont* is determined to be a "major dispute", the Courts in the 4th Circuit which will further consider the *Piedmont* case may make the same decision as was made by the Courts below in this case.

To give effect to the dictum of the Court of Appeals in *Piedmont,* which is the position urged by petitioner would, in effect, incorporate the Labor Management Relations Act into the Railway Labor Act, notwithstanding the Labor Management Relations Act expressly does not apply to employers and employees subject to the Railway Labor Act, 29 USC 152(2), (3) and this Court has stated in *Chicago River & Indiana R. Co. v. Brotherhood of Railroad Trainmen,* 353 U. S. 30 (1957) at 32 fn. 2 that:

> "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act, . . ."

and more recently in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369, 384 (1969) that:

> ". . . It should be emphasized from the outset that the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes. . . ."

and, unlike the Railway Labor Act, the Labor Management Relations Act does not provide for compulsory mediation in such circumstances and, under the Labor Management Relations Act, good faith negotiation is the first and last requirement of that Act, *United Industrial Workers, etc. v. Board of Trustees of Galveston Wharves*, 400 F. 2d 320 (5th Cir. 1968) at 329-330, *National Airlines, Inc. v. International Ass'n. of Machinists*, 416 F. 2d 998 (5th Cir. 1969) at 1004.

The dictum in the *Piedmont* case was that the District Court should, if it found the dispute to be a "major" dispute conduct "a trial on the merits" of the employer's claim that the union had violated Section 2, First of the Railway Labor Act in negotiating and mediating and determine the employer's claim upon evidence of "the details of each bargaining session" and, if "the trial discloses a lack of good faith bargaining, should issue an injunction against a strike by the union," but that the injunction "must not be a permanent bar to the strike" but should provide for "its dissolution whether or not agreement is reached, when the union complies with the Act" because "[t]he union—no less than the company—has the right to resort to self-help when proceedings under the Act have been exhausted" (416 F. 2d at 638).

The dictum of the Court of Appeals in *Piedmont* would, in effect, equate Section 2, First, of the Railway

Labor Act with Section 8(a)(5), Section 8(b)(3) and Section 8(d) of the Labor Management Relations Act of June 23, 1947, c. 120, 61 Stat. 140 (App. A-8-10) which provide that it shall be an "unfair labor practice" for an employer or a labor organization not to 'confer in good faith' with respect to wages, hours, and other terms of employment" in "the negotiation of an agreement" so that Section 2, First of the Railway Labor Act is justiciable and judicially enforceable by the Courts, like Sections 8(a)(5), (b)(3) and (d) of the Labor Management Relations Act, upon the complaint made by an employer under Section 10(b) of that Act (App. A-11) are justiciable, initially by the National Labor Relations Board and thereafter by the Courts in an action by the National Labor Relations Board to enjoin a strike by a union over a dispute with respect to which the National Labor Relations Board has determined by the employer's complaint and upon evidence of the conduct of the union that there is probable cause to believe or that the union has been guilty of such unfair labor practice as provided in Section 10 (j), (k) and (l) of the Labor Management Relations Act (App. A-12-14) so that unions representing employees under the Railway Labor Act should be enjoined from engaging in a strike over such dispute until it shall have purged itself of such unfair labor practice by engaging in re-negotiation, or in re-mediation by the National Mediation Board or, in cases in which an investigation has been made of the dispute by a Presidential Emergency Board by re-participating in a re-investigation by a re-established Presidential Emergency Board to an extent that it may, in the judgment of the Court, then be entitled to exercise the right of self-help and strike, which is implicit in the Railway Labor Act after the requirements of that Act have been exhausted, as most recently stated in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Company,* 394 U. S. 369, 378 (1969), and which is preserved by statute to

employees subject to the Labor Management Relations Act by 29 USC 163 after the requirements of that Act have been met.

Norfolk & P. B. R. R. v. Brotherhood of Railroad Trainmen, 248 F. 2d 34 (4th Cir. 1957) (Ptn. 9-10), involved a minor dispute which the railroad had submitted to the National Railroad Adjustment Board and the Court held that the anti-strike injunction properly had been issued under *Chicago River & Indiana R. Co. v. Brotherhood of Railroad Trainmen,* 353 U. S. 30 (248 F. 2d at 40, 46). The statement of the Court (248 F. 2d at 45, f. n. 6), upon which Petitioner relies in this case, that the negotiation required by the Railway Labor Act is the "good faith" bargaining required by the Labor Management Relations Act, was pure *obiter,* having been made with respect to bargaining which might occur later if the union sought an agreement to remedy any adverse effects which might result from the change of the on and off duty point if the National Railroad Adjustment Board should find the railroad had the right to make the change under the existing agreement or that the agreement did not prohibit the change.

Brotherhood of Railway & Steamship Clerks, etc. v. Atlantic Coast Line R. Co., 201 F. 2d 36 (4th Cir. 1953), *cert. den.* 345 U. S. 992 (1953) (Ptn. 9, 10) should be considered with *Rose v. Brotherhood of Ry. & Steamship Clerks,* 181 F. 2d 944 (4th Cir. 1950), *cert. den.* 340 U. S. 851 (1950), which was an appeal from the decision in *Brotherhood of Ry. & Steamship Clerks v. Atlantic Coast Line R. Co.,* 85 F. Supp. 115 (D. C. 1950). The National Mediation Board had certified the Brotherhood to be the representative of the clerical employees of the railroad including some 850 employees who theretofore had not been subject to the collective agreement and who in the *Rose* case, unsuccessfully sought to continue to be excluded.

After the certification by the National Mediation Board, the Brotherhood submitted a proposal for an agreement to be applicable to employees theretofore excluded. The Railroad listened, made no objection to the proposal but declined to agree to it or submit any counter-proposal. The National Mediation Board was unable to bring about an agreement, proposed arbitration which the railroad refused and then terminated its jurisdiction. Instead of calling a strike, the Brotherhood instituted an action for a mandatory injunction to compel the railroad to negotiate as required by Section 2, Ninth of the Railway Labor Act. The District Court dismissed the action and the Court of Appeals reversed with directions to the District Court to issue an injunction requiring the Railroad to bargain in good faith with the Brotherhood with respect to rates of pay, rules, and working conditions of the entire craft of its clerical employees, including the employees with respect to whom the railroad theretofore had refused to bargain, 201 F. 2d at 41. The question decided by the Court below in this case was not raised or decided.

B

The decision of the Court below is not in conflict with any decision of the Courts of the District of Columbia Circuit.

Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co., 385 F. 2d 581 (D. C. Cir. 1967), *cert. den.* 390 U. S. 923 (1968) (Ptn. 12) was not concerned with the question whether Section 2, First of the Railway Labor Act is justiciable *after exhaustion* of the requirements of the Act for conference and mediation; it arose prior to and was concerned with the future exhaustion of such procedures.

Although *Akron & Barberton Belt* did not present and the Court did not decide the question decided by the Court

below in this case, we believe we should, nevertheless, comment upon it because petitioner's treatment of it is incorrect and misleading.

In that case the Court decided appeals from many decisions of the District Court (385 F. 2d at 592), including specifically the decisions in *Akron & Barberton Belt R. Co. v. Brotherhood of Railroad Trainmen,* 250 F. Supp. 691; 252 F. Supp. 207 and 254 F. Supp. 306 (385 F. 2d at 599, f. n. 36), and *Akron & Barberton Belt R. Co. v. Order of Railway Conductors,* 253 F. Supp. 538 (385 F. 2d at 598, f. n. 32 and at 614).

Petitioner quotes from the opinion of the District Court in *Akron & Barberton Belt R. Co. v. Order of Railway Conductors,* 253 F. Supp. 538 and incorrectly states (Ptn. 12) that the Court of Appeals affirmed the quoted statement.

The Conductors' union served a notice under Section 6 of the Railway Labor Act on March 23, 1965, more than nine months before the Award of Arbitration Board 282 was to expire, proposing an agreement to be effective thirty days thereafter to provide for a minimum crew of a conductor and two trainmen (385 F. 2d at 598).

Thereafter, in June and July, 1965, the Brotherhood of Railroad Trainmen served similar notices proposing an agreement to become effective on January 25, 1966, the day on which the Award was to expire, providing for a minimum crew of a conductor and two trainmen in road service and a foreman and two helpers in yard service.

In the *Brotherhood of Railroad Trainmen* case, on March 3, 1966, the District Court ruled that the Trainmen's notices were not effective prior to, but did become effective upon the expiration of the Award on January 25, 1966 and issued an injunction requiring the parties to

maintain the status quo while they pursued the various steps of negotiation, mediation, etc., provided by the Railway Labor Act for effecting changes in the changes which had been made under the Award (250 F. Supp. 691 at 695-698 and 252 F. Supp. 207 (D. D. C., March 28, 1966).

On April 9, 1966 the District Court made the same ruling with respect to effectiveness of the notice served by the conductors and noted that such conferences as there had been with respect to the notice did not meet the negotiation requirements quoted by petitioner (Ptn. 11-12) which the District Court ruled would have to be met *after* the conductors' notice became effective and before mediation although the National Mediation Board had then taken jurisdiction of the dispute.

On May 9, 1966 the railroads filed a motion in the *Trainmen's* case for an order restraining the Trainmen from participating in mediation being conducted by the National Mediation Board with respect to the crew consist dispute between the trainmen and the Atlantic Coast Line R. Co., the Baltimore & Ohio R. Co., the Missouri Pacific R. Co., and the Louisville & Nashville R. Co., arising from Section 6 notices served by and upon the union and those railroads prior to January 26, 1966, on the ground that since such date there had not been the conferences required by Section 2, First and Section 6 of the Railway Labor Act with respect thereto (Vol. II, pp. 185-191, Joint Appendix, filed in Nos. 20,225 and 20,246 in the U. S. Court of Appeals for the District of Columbia Circuit in *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.*, and in this Court in *Akron & Barberton Belt R. Co. et al. v. Brotherhood of Railroad Trainmen et al.*, No. 863, October Term, 1967). The District Court ruled on that motion on May 19, 1966, that full-fledged conferences with respect to the merits of the trainmen's dispute must be held subsequent to that time

to fulfill the requirements of the Railway Labor Act but declined to issue any order interfering with proceedings of the National Mediation Board (254 F. Supp. 306) and entered an Order to that effect (Vol. II, p. 318, Joint Appendix, *supra*).

In the Conductors' case the Court of Appeals held the Conductors' notice was invalid and the railroads were not required to bargain with respect to it but did not comment upon the statement by the District Court quoted by petitioner (385 F. 2d at 598) and held the injunction issued by the District Court against a strike by the conductors was not precluded by the Norris-LaGuardia Act (385 F. 2d at 614).

In contrast to that disposition of the Conductors' case, the Court of Appeals, in the *Trainmen* case, held the notices served by the Trainmen were valid when served, required the railroads to negotiate and that the railroads, by refusing to negotiate, had violated their duties under the Act, had forsaken their right to insist upon conferences, and the dispute properly had been advanced to mediation and, also, that the anti-strike injunction against the Trainmen was issued in violation of the Norris-LaGuardia Act (385 F. 2d at 597, 599 and 613).

Atlantic Coast Line R. Co. et al. v. Brotherhood of Railroad Trainmen, 262 F. Supp. 177 (D. D. C. 1966), *rev'd.* 383 F. 2d 225 (D. C. C. 1967), *cert. den.* 389 U. S. 1047 (1968) (Ptn. 13), as distinguished from the *Akron & Barberton Belt* case, did arise after the National Mediation Board terminated its jurisdiction of the crew consist dispute between the Trainmen and the Atlantic Coast Line R. Co., the Boston & Maine R. Co., and the Des Moines Union R. Co. In the *Atlantic Coast Line* case, the railroads sued for a declaratory judgment that the requirements of the Railway Labor Act had not been ex-

hausted by the union because it had not bargained in good faith as required by Section 2, First and Second of the Railway Labor Act as demonstrated by (1) premature service of its notices in June and July 1965, prior to the expiration of Arbitration Board 282; (2) making and adamant, by insisting upon proposals which were not in accordance with the Award of Arbitration Board 282 and which drastically differed from rules found to be justified in proceedings under such award without attempting to justify the proposed changes; and (3) by not agreeing to negotiation upon a national agreement contrary to the long established practice (pp. 2-34, Joint Appendix filed in *Atlantic Coast Line et al. v. Brotherhood of Railroad Trainmen*, No. 20,178 in the United States Court of Appeals for the District of Columbia Circuit and in *Atlantic Coast Line et al. v. Brotherhood of Railroad Trainmen*, filed in this Court in No. 883, October Term, 1967).

Without ruling on the Union's objection to the jurisdiction of the Court, as did the Courts below in this case, although the jurisdiction of the Court was raised in the *Atlantic Coast Line* case (pp. 34, 35, 41, Joint Appendix, *supra*), the District Court conducted a trial on evidence of prior national handling of disputes and the conduct of the parties in negotiation and mediation with respect to each of the disputes between the union and each of the three railroads.

The District Court found the union had bargained in good faith with the three railroads over the crew consist issue but had violated the Railway Labor Act by not agreeing to national handling. *Atlantic Coast Line et al. v. Brotherhood of Railroad Trainmen*, 262 F. Supp. 177 (D. D. C. 1967) at 183-185.

The Union's appeal in *Atlantic Coast Line* was concerned only with the question of whether the union vio-

lated any duty under the Railway Labor Act by not agreeing to national handling as demanded by the railroads. The Court of Appeals reversed the decision of the District Court and held the union did not violate the Railway Labor Act by not agreeing to national handling of the crew consist dispute (383 F. 2d 225). This Court denied certiorari, 389 U. S. 1047.

Thus, the Court of Appeals for the District of Columbia did not *decide* in either *Akron & Barberton Belt R. Co.*, or *Atlantic Coast Line*, the question decided by the Court below in this case.

The two other decisions by the Court of Appeals for the District of Columbia Circuit, to which petitioner refers are *Brotherhood of Railway Clerks v. Railroad Retirement Board*, 239 F. 2d 37, in which Mr. Chief Justice (then Judge) Burger, wrote the opinion (Ptn. 12), and *Southern Railway v. Brotherhood of Locomotive Firemen & Enginemen*, 217 F. Supp. 58, 223 F. Supp. 249, 384 F. 2d 323 (1967) (Ptn. 13).

The question decided by the Court below in this case was not involved in nor decided in either of those cases. The questions in the *Retirement Board* case were whether the conduct of certain employees, in not working, amounted to a strike in violation of the Railway Labor Act and whether, if it did, the employees were entitled to unemployment insurance payments under the Railroad Unemployment Insurance Act.

Southern Railway Co. v. Brotherhood of Locomotive Firemen & Enginemen, 217 F. Supp. 58 (D. D. C. 1963), and 223 F. Supp. 249 (D. D. C. 1963), and 384 F. 2d 323 (D. C. Cir. 1967) (Ptn. p. 13), involved a question concerning whether, under the existing collective agreement, the Southern had the right to discontinue employing firemen on diesel engines which dispute was pending before

the National Railroad Adjustment Board and, also, a dispute arising from notices served by each party for agreements regarding the employment of firemen. The Court of Appeals affirmed an injunction requiring the Southern to restore and maintain the *status quo* existing prior to the dispute pending a determination by the National Railroad Adjustment Board whether the Southern had the right under the agreement to cease employing firemen, or if not, until it should acquire that right by exhausting the requirements of the Railway Labor Act with respect to its Section 6 notice. It did not remotely involve the question decided in this case by the Court below.

In *Chicago, Burlington & Quincy R. Co. v. Railway Employees Dept.*, 301 F. Supp. 603 (D. D. C., 1969) (Ptn. 13) the District Court held the Union was required to bargain with all the railroads with which it had made the agreement it desired to change, rather than with only one of those railroads and stated that it reached no conclusion on the issue of good faith bargaining by the union before or during mediation. *International Association of Machinists v. National Railway Labor Conference*, 310 F. Supp. 905 (D. D. C., 1970) (Ptn. 13-14) was to the same effect.

Thus, it is apparent that none of the Courts in the District of Columbia have rendered any decision in conflict with the decision of the Court below in this case.

C

We turn now to petitioner's claim of a conflict of the decision of the Court below in this case with decisions by the Courts in the Second Circuit.

In *Chicago, R. I. & P. R. Co. v. Switchmen's Union of North America*, 292 F. 2d 61 (2d Cir., 1961) (Ptn. 14, fn. 10), an anti-strike injunction was sought on the ground

the union had violated Section 2, First of the Railway Labor Act in negotiation and mediation because its negotiators were not empowered to consummate an agreement because the Union's constitution required ratification by the members (*cf. Piedmont, supra*) and because of the conduct of the Union's representatives during the entire course of negotiation and mediation (292 F. 2d 61-62, 68). The District Court granted the injunction. The Court of Appeals reversed in an opinion by Judge Friendly on the ground the injunction was precluded by the Norris-LaGuardia Act (267 F. 2d at 71) and expressly did not decide the question decided in this case by the Court, saying (292 F. 2d at 67):

> ". . . Appellees argue with force that it is as much a violation of the Railway Labor Act to make only a token effort to comply with its prescribed processes as to strike without even the pretense; the problem is that issuing an injunction on such a ground inevitably involves the court in some consideration of the labor dispute as bearing on the good faith of the employee representatives—and this without the advance administrative screening provided under the National Labor Relations Act in 29 U. S. C. A., § 160 (a), (b), (h), (i), and (l) and §§ 176-180. *We find it unnecessary here either to affirm or to deny that an injunction against a strike may be issued on such a claim, . . .*" (emphasis supplied).

Pan American World Airways, Inc. v. Flight Engineers International Association, 306 F. 2d 840 (2d Cir., 1962) (Ptn. 14-15) involved two disputes. The requirements of the Railway Labor Act with respect to one had been exhausted but not with respect to the other. The District Court, ignoring the exhaustion of the requirements of the Act with respect to one of the disputes, granted a preliminary injunction against a strike by the Union on the

ground the Union had not made every reasonable effort to settle the dispute as contemplated by Section 2, First of the Railway Labor Act. The Court of Appeals reversed, saying, 306 F. 2d at 846:

> "We may assume that the compulsion of injunction is available against strikes during the period when the National Mediation Board is attempting to mediate the dispute, and during the existence of a Presidential Emergency Board, and for thirty days after the report of such a Board. . . .
>
> "When the cooling-off procedures of the Act, including the appointment and report of the Emergency Board, if resort is had to that procedure, are exhausted and the final thirty day period has elapsed it is quite clear that the Act contemplates that further progress toward the determination of the controversy will be left entirely to the interplay of economic forces without further governmental intervention. The parties are then free from all compulsion under the Act and may resort to 'self-help', e. g., the union may then strike. As the Supreme Court said in *Elgin, supra*, 'compulsions go only to insure that those procedures [i. e., the procedures of mediation] are exhausted before resort can be had to self-help.' . . .
>
> "It follows that no injunction can issue under the Act against a strike which is undertaken after the mediation processes of the Act have been completed and the time limit which is provided has elapsed. . . .
>
> "Not only is there no authority under the Act for enjoining a strike which is begun at such a time, but the express provisions of the Norris-La Guardia Act deprive the Federal courts of jurisdiction to issue an injunction. . . ."

Thus, what the Court said in *Pan American* with respect to the claim of Pan American that the Union had not

complied with the requirements of Section 2, First of the Railway Labor Act in the negotiations with respect to the unresolved crew consist dispute which had not even gone to mediation (306 F. 2d at 849) obviously was *obiter dictum*, and, even if it were not, did not involve the question decided by the Court below in this case.

The other cases decided by the Court of Appeals for the Second Circuit which petitioner considers in the text of its petition and which were decided subsequent to *Chicago, R. I. & P. R. Co.*, and *Pan American World Airways* are *Kennedy v. Long Island R. Co.*, 211 F. Supp. 478 (D. C. N. Y. 1962), 319 F. 2d 366 (1963); *Long Island R. Co. v. System Federation*, 368 F. 2d 50 (1966) and *Seaboard World Airlines, Inc. v. Transport Workers Union of America*, 62 CCH Lab. Cas. ¶ 10,759, 73 LRRM 2894 (2d Cir. 1970).

The *Kennedy* case, *supra*, was an action for damages allegedly sustained by the Brotherhood of Railroad Trainmen as a result of a strike which the Railroad resisted twenty-six days, because, the Union claims, the railroad, together with twenty-two other railroads, had insurance against losses due to strikes. The Union contended the Railroad, by having such insurance, per se, violated Section 2, First of the Railway Labor Act, since the insurance was destructive of the duty of the Railroad under Section 2, First of the Railway Labor Act.

In *Long Island R. Co. v. System Federation, supra*, the Court found that actions and omissions of employees directed by the Union amounted to a strike to force the Railroad to negotiate with the Union with respect to changes in the collective agreement which were subject to a moratorium agreement issued an anti-strike injunction because the requirements of the Railway Labor Act for accomplishing the desired change had not been commenced nor exhausted by the Union.

Seaboard World Airlines, Inc. v. Transport Workers Union of America, 73 LRRM 2148 (D. C. N. Y. 1969) modified and aff'd., 62 CCH Lab. Cas. ¶ 10,759, 73 LRRM 2894 (2d Cir. 1970), involved the legality of a perpetual moratorium provision in an existing collective agreement with respect to changes which Union desired to effect and for which it had served a Section 6 Notice. The Court of Appeals ruled the question of the legality of the permanent moratorium provision of the collective agreement should be resolved by the Courts, rather than by an arbitration board, that an anti-strike injunction pending the resolution of the question of the legality of the permanent moratorium provision was not prohibited was not prohibited by the Norris-La Guardia Act and could be continued conditioned upon Seaboard maintaining the *status quo* and affirmed the order of the District Court denying the Union's Motion to compel Seaboard to negotiate with respect to its Section 6 Notice, pending the resolution of the legality of the moratorium provision of the collective agreement.

Theree cases which were decided by District Courts in the Second Circuit upon which petitioner relies (Ptn. 15) were decided prior to the decision of *Chicago, Rock Island & Pacific R. Co. v. Switchmen's Union of North America, supra,* in which the Court of Appeals declined to state, *even as dictum,* whether a violation by a party to a major dispute of Section 2, First of the Railway Labor Act, would be such a violation of the Railway Labor Act as would permit an anti-strike injunction under the Norris-LaGuardia Act. They were *American Airlines, Inc. v. Air Line Pilots Ass'n. Inc.,* 169 F. Supp. 777 (D. C. N. Y. 1958), *Long Island Railroad Co. v. Brotherhood of Railroad Trainmen,* 185 F. Supp. 356 (D. C. N. Y. 1960) and *Pan American World Airways, Inc. v. Brotherhood of Ry. & Steamship Clerks,* 185 F. Supp. 350 (D. C. N. Y. 1960) in which the District Courts did, subsequent to exhaustion

of the requirements of the Railway Labor Act, conduct an evidentiary hearing on an alleged violation by the Union of Section 2, First of the Railway Labor Act, as a basis for an anti-strike injunction: After such hearing the Court denied a preliminary injunction in *American Airlines;* a temporary restraining order was issued in the other two cases. The question decided by the Court below in this case was not considered or decided in any of those cases; the District Courts apparently assuming the issue was justiciable and a violation of Section 2, First by a Union, if established could be the basis for an anti-strike injunction which the Court of Appeals for the Circuit questioned in the *Chicago, Rock Island & Pacific* case, *supra.*

The two cases which were decided by District Courts in the Second Circuit since *Chicago, Rock Island & Pacific R. Co.*, and *Pan American* (Ptn. 15), did not remotely involve the question decided by the Court below in this case.

In *KLM Royal Dutch Airlines v. Transport Workers Union of America,* 49 CCH Lab. Cas. ¶ 18,990, 56 LRRM 2205 (D. C. N. Y. 1964) a temporary restraining order was issued against a strike over a dispute with respect to which a Section 6 Notice apparently had been served or, if not, was contemplated, with respect to which there had been some negotiations but which had been terminated, so as to permit the invocation of the services of the National Mediation Board or for that Board to proffer its services.

In *Long Island Railroad Company v. Local Union 808, International Brotherhood of Teamsters,* 57 CCH Lab. Cas. ¶ 12,378; 67 LRRM 2463 (D. C. N. Y., 1967), the District Court issued a preliminary injunction against a strike by the Teamsters over a dispute which was then subject to the jurisdiction of the National Mediation Board.

D

We turn now to petitioner's claim of a conflict between the decision of the Court below in this case with decisions in cases in the Fifth Circuit (Ptn. 11 and 16). *Southern Railway v. Brotherhood of Locomotive Firemen & Enginemen*, 223 F. Supp. 296 (D. C. M. D. Ga. 1962), *aff'd on the basis of opinion below*, 324 F. 2d 503 (5th Cir. 1963) (Ptn. 11) was an action for declaratory judgment with respect to whether certain proposals made in a Section 6 notice served by the union were barred by a moratorium agreement and whether others were mandatorily bargainable. The case was dismissed as presenting no justiciable controversy (233 F. Supp. at 307-308). In quoting from the opinion in the case (Ptn. 11) petitioner omits the qualifying word "while" which establishes the *obiter dictum* nature of the part of the opinion relied upon by petitioner. The full quotation was (223 F. Supp. at 305):

> "*While* the courts have lent their aid to disputants by passing upon the validity *vel non* of a bargaining contract, . . . and *while* in a series of cases, where collective bargaining agents stepped outside their legal duties and violated the act which called them into being, such bargaining agents have been enjoined, . . . and *while* the courts have enjoined strikes in order to protect the jurisdiction of the National Railway Adjustment Board in minor disputes, . . . and have enjoined threatened and impending strikes in major disputes where good faith bargaining has not taken place in the manner and to the extent required by the act, . . . the courts have not generally treated as justiciable a controversy of the type and nature here presented. . . ." (*vel non* in text; other emphasis supplied.)

United Industrial Workers, etc. v. Galveston Wharves (Ptn. p. 16) has been considered by the Court of Appeals

for the Fifth Circuit several times, 351 F. 2d 183 (1965), 368 F. 2d 412 (1966) and 400 F. 2d 320 (1968). While a collective agreement, subject to the Railway Labor Act, was in effect and, after the Union had served a notice on the Trustees of the Galveston Wharves under Section 6 of the Railway Labor Act for changes in the agreement, the Trustees leased to a corporation not subject to the Railway Labor Act, an elevator at which its employees, who were subject to the Railway Labor Act, were employed and who would lose their jobs after the Trustees ceased to operate the elevator. The Trustee did so without serving a notice on the union under the provisions of Section 6. Prior to the effective date of the lease the union served a second notice on the Trustees, under Section 6 of the Railway Labor Act for an agreement covering the shut down, leasing or subcontracting of the elevator. The Trustees met with the Union but declined to negotiate for an agreement on the Union's second Section 6 notices on the ground it, theretofore, had executed the lease which was to become effective August 1, 1964. On July 31, 1964 the Union commenced a strike and sued for an injunction against the Trustees' consummating or operating under the lease and to require the trustees to maintain the *status quo* pending exhaustion of the requirements of the Railway Labor Act (351 F. 2d at 185-186, 400 F. 2d at 321-2). The District Court found the dispute to be a minor dispute and relegated the parties to the National Railroad Adjustment Board. The Court of Appeals found it was a major dispute and reversed because there had been no pretense on the part of the Trustees to comply with Section 6 of the Railway Labor Act—ordered the District Court to impose suitable relief and sanction for the protection of the displaced employees so that bargaining on the Union's Section 6 notices could proceed without requiring the Trustees to cancel the lease.

The subsequent decisions in the case were concerned with whether the District Court had, as ordered by the Court of Appeals, imposed suitable relief and sanctions for the displaced employees. Obviously the case does not involve the question decided by the Court below in this case.

In *National Airlines, Inc. v. International Ass'n of Machinists,* 416 F. 2d 998 (5th Cir. 1969) (Ptn. p. 17), the only question was whether an employer's wholesale discharge of employees represented by the Union was in violation of the *status quo* provisions of the Railway Labor Act or was justified by a "wildcat strike" which the union could not control, and obviously did not involve the question decided by the Courts below in this case.

E

The only case which arose in the Sixth Circuit to which petitioner refers (Ptn. 17, fn. 11) is *Capitol Airways, Inc. v. Air Line Pilots Assn.,* 223 F. Supp. 168 (M. D. Tenn. 1961). It involved a question of the validity of a collective agreement and not the question decided by the Court below in this case.

F

Lastly, we turn to the decision of the Court of Appeals for the Eighth Circuit which petitioner claims conflicts with the decision of the Court below in this case (Ptn. 17, f. n. 11).

In *Flight Engineers Int'l Ass'n. v. Trans World Airlines, Inc.,* 305 F. 2d 675 (8th Cir. 1962), on July 29, 1958 Trans World Airlines and the Union had made a comprehensive so-called "Basic" agreement covering rates of pay, rules and working conditions of flight engineers

which was to continue in effect until at least January 1, 1961 and on the same date, a separate "letter agreement" for flight engineers to participate in a training program to work on jet aircraft. The letter agreement provided that, after it had been in effect for one year, it was subject to change by the service of notice under Section 6 of the Railway Labor Act but in no event should it extend beyond January 1, 1961 when the basic agreement was to expire. On February 12, 1960 the Union served a notice under the provisions of Section 6 of the Railway Labor Act for changes in the letter agreement which included proposals TWA claimed were not mandatory subjects of collective bargaining. On February 16, 1960 TWA served a counter-notice on the Union. On October 26, 1960 the Union and on October 27, 1960, TWA, served notices under Section 6 of the Railway Labor Act for changes in the basic agreement. Thereafter, TWA filed a suit against a threatened strike by the Union, on the ground the union had not negotiated in good faith as required by the Railway Labor Act with respect to the notices relating to the basic agreement because the Union had insisted, as a condition to bargaining on changes in the basic agreement, upon an agreement with respect to proposed changes in the letter agreement which TWA claimed were not negotiable. On September 29, 1961 the District Court entered an injunction against a strike by the Union. The Union appealed and while the appeal was pending withdrew the proposals with respect to changes in the letter agreement to which TWA objected and moved for the dissolution of the injunction. The dispute with respect to changes in the basic agreement was progressed to mediation and the National Mediation Board terminated its services with respect thereto, after which the President established an emergency board. The Court of Appeals found the only justiciable issue had ceased to exist when both the letter agreement and basic agreement expired on January 1, 1961 and dismissed the appeal.

Northwest Air Lines, Inc. v. Air Line Pilots Ass'n, 185 F. Supp. 77 (D. C. Minn., 1960) (Ptn. 17, fn. 11) did not involve the question decided by the Court below in this case; the Court stated (185 F. Supp. 79) that although Northwest asserted in its pleadings that the union had not complied with Section 2, First, of the Railway Labor Act "it did not pursue such theory."

III

The Decision of the Court Below With Respect to the Role of the National Mediation Board Is Correct and Does Not Warrant Review

The decision of the Court below with respect to the role of the National Mediation Board is so clearly in accord with the established and accepted view of the function of that Board under the Railway Labor Act that it does not present a conflict with any decided case nor any important question of federal law which has not been, but should be, decided by this Court.

This Court has very recently reaffirmed that the Railway Labor Act is designed to accomplish the voluntary resolution of major disputes by requiring notice of intended change, providing for conference and negotiation, mediation and conciliation, voluntary arbitration and by focusing public attention upon the dispute by an investigation of a dispute and a report with respect thereto by a Presidential Emergency Board and withholding the exercise of self-help until after those facilities for resolving the dispute by agreement and which are purposely long and drawn out have been unsuccessfully used. *Detroit & Toledo Shore Line R. Co. v. United Transportation Union*, 396 U. S. 142, 90 S. Ct. 294 (1969) at 298-301 and cases there cited.

Nowhere does the Act expressly provide for judicial review of the conduct of parties in conference, mediation or in an investigation by a Presidential Emergency Board. Nor does the text of the Act provide for the exercise of self-help to be dependent upon the result of a judicial determination, after an evidentiary review of the conduct of parties in conferences, mediation or in an investigation by an Emergency Board of whether the parties complied with Section 2, First, such as is provided for by the Labor Management Relations Act, which, as heretofore shown herein, does not provide for compulsory mediation but is concerned solely with the unfair labor practice of refusal to negotiate in good faith; and negotiation in good faith as the first and last step required of the parties by that Act as a condition to the exercise of self-help.

Section 5, First of the Railway Labor Act, 45 USC 155, First of the Act, mandatorily provides that the National Mediation Board "shall promptly put itself in communication with the parties" to a dispute if neither party has requested the services of the Board, as each is authorized to do, in cases "where conference with respect to the dispute has been refused" by a party or the dispute "was not adjusted in conferences" between them.

Section 5, First, also mandatorily provides that the National Mediation Board "use its best efforts", by mediation to bring the parties to agreement and if those efforts fail to "bring about an amicable settlement" also to "use its best efforts" "to induce the parties to submit their controversy to arbitration".

The Board is also empowered by Section 10 of the Act, 45 USC 160, to notify the President of any dispute which has not been adjusted or submitted to arbitration as a

result of the efforts of the National Mediation Board in order that the President may determine whether to establish an Emergency Board to investigate the dispute and make a report with respect thereto which may include an investigation of the conduct of the parties and a report with respect thereto.

The Annual Reports of the National Mediation Board establish that the Board is well aware of the *status quo* provisions of the Railway Labor Act and of the duty of each party under Section 2, First of the Act, *National Mediation Board*, Thirty-Fifth Annual Report (1969), pp. 3-16, 36-40.

The necessity for the National Mediation Board to make decisions is implicit in the discharge of its duties, not the least of which decisions is whether the parties to a dispute have fulfilled their Section 2, First duty and should be remitted to self-help, subject to an investigation of the dispute and the conduct of the parties by an Emergency Board which the President may establish upon the recommendation of the Board under Section 10 of the Act.

The decisions of the National Mediation Board that the requirements of the Railway Labor Act have been exhausted and that the parties should be remitted to self-help, subject only to the possibility of an investigation and report by a Presidential Emergency Board, was given in this case by advising the parties that:

> "It is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement.
>
> "In these circumstances, notice is hereby served in behalf of the Board that its services (except as provided in Section 5, Third, and in Section 10 of the

law) have this day been terminated under the provisions of the Railway Labor Act.

. . .

"By order of the National Mediation Board.

/s/ Thomas A. Tracy
Thomas A. Tracy
Executive Secretary." (Def. Ex. 7, Tr. 433)

which is the usual manner in which the National Mediation Board expresses its final decision terminating its jurisdiction. (*National Mediation Board*, 35th Annual Report, June 30, 1969, pp. 6-7.)

The National Mediation Board is also required by Section 2, Ninth, of the Railway Labor Act to make decisions as to which employees constitute a craft or class for the purposes of electing a representative of the craft or class and to determine what individual organization has been designated by a majority of the employees of such craft or class to be the representative of all the employees. Those decisions of the National Mediation Board are evidenced only by the certificate which it issues and are not subject to judicial review under *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297 (1943), in which this Court said, at 303-4:

> "The fact that the certificate of the Mediation Board is conclusive is of course no ground for judicial review. . . . Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved. . . . We need not determine the full reach of that rule. . . .
>
> But its application here is most appropriate by reason of the pattern of this Act.

> While the Mediation Board is given specified powers in the conduct of elections, there is no requirement as to hearings. And there is no express grant of subpoena power. The Mediation Board makes no 'order.' And its only ultimate finding of fact is the certificate. . . . The function of the Board under §2, Ninth is more the function of a referee. To this decision of the referee Congress has added a command enforcible by judicial decree. . . ."

Unlike the judicially enforceable command of Section 2, Ninth, as heretofore shown by the decisions cited under Point I, *supra*, the Railway Labor Act does not contemplate judicial enforcement of Section 2, First after the National Mediation Board has terminated its jurisdiction of a dispute but, instead, contemplates no further governmental compulsion and relegates the parties to self-help, subject only to postponement of the exercise of self-help if a Presidential Emergency Board is established.

The text of the Railway Labor Act does not provide for judicial review of decisions of the National Mediation Board that all of the requirements of the Act for resolving the dispute just as it does not provide for judicial review of decisions of the National Mediation Board under Section 2, Ninth of the Act with respect to what employees constitute a craft or class and the representative designated by a majority thereof which decision is expressed only by a certificate of the Board given to the parties.

The decision of the National Mediation Board with respect to the exhaustion of the requirements of the Act, for which the Act does not provide judicial review, and which is given the parties by letter, should be given the same finality and not be subject to judicial review for the same reason that decisions of the Board under Section 2, Ninth were determined to be final and not subject to judicial review in the *Switchmen's Union case, supra.*

CONCLUSION

For the foregoing reasons the writ of certiorari should be denied.

Respectfully submitted

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July 27, 1970

APPENDIX A

TRANSPORTATION ACT OF 1920, ch. 91, Tit. III, 41 Stat. 469

Section 301

"It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute."

RAILWAY LABOR ACT OF 1926, ch. 347, 44 Stat. 577

Section 2, First (now 45 U. S. C. 152, First)

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Second

"All disputes between a carrier and its employees shall be considered, and, if possible, decided, with all

APPENDIX

CONCLUSION

For the foregoing reasons the writ of certiorari should be denied.

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APPENDIX A

TRANSPORTATION ACT OF 1920, ch. 91, Tit. III, 41 Stat. 456

Section 301

"It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute."

RAILWAY LABOR ACT OF 1926, ch. 347, 44 Stat. 577

Section 2, First (now 45 U. S. C. 152, First)

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Second

"All disputes between a carrier and its employees shall be considered, and, if possible, decided, with all

expedition, in conference between representatives designated and authorized so to confer, respectively, by the carriers and by the employees thereof interested in the dispute."

Section 2, Third

"Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

Section 5

"First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Board of Mediation created by this Act, or the Board of Mediation may proffer its services, in any of the following cases:

(a) A dispute arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions not adjusted by the parties in conference and not decided by the appropriate adjustment board;

(b) A dispute which is not settled in conference between the parties, in respect to changes in rates of pay, rules, or working conditions; . . ."

NORRIS-LA GUARDIA ACT, 29 U. S. C.

Section 104

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or

growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title."

Section 107

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection. . . ."

RAILWAY LABOR ACT OF 1934, ch. 691, 48 Stat. 1186, 45 U. S. C. 152

Section 2, Second

"All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible,

decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

Section 2, Third

"Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Section 2, Fourth

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any

dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 2, Ninth

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the pur-

poses herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Section 5

"Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time. . . ."

LABOR MANAGEMENT RELATIONS ACT OF 1947, ch. 120, Stat. 136, Amending the Labor Management Relations Act of 1935, 49 Stat. 449, now 29 U. S. C.

Section 152 (2)

"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly

owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

Section 152(3)

"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

Section 158 (a) (5)

"It shall be an unfair labor practice for an employer— . . .

to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

Section 158 (b) (3)

"It shall be an unfair labor practice for a labor organization or its agents— . . .

to refuse to bargain collectively with an employer provided it is the representative of his employees subject to the provisions of section 159(a) of this title;"

Section 158 (d)

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

on 160 (b)

'Whenever it is charged that any person has en-
ged in or is engaging in any such unfair labor prac-
e, the Board, or any agent or agency designated by
Board for such purposes, shall have power to issue
d cause to be served upon such person a complaint
ting the charges in that respect, and containing a no-
e of hearing before the Board or a member thereof, or
fore a designated agent or agency, at a place therein
ed, not less than five days after the serving of said
nplaint: *Provided,* That no complaint shall issue
ed upon any unfair labor practice occurring more
n six months prior to the filing of the charge with
Board and the service of a copy thereof upon the
son against whom such charge is made, unless the
son aggrieved thereby was prevented from filing
h charge by reason of service in the armed forces,
which event the six-month period shall be computed
m the day of his discharge. Any such complaint
y be amended by the member, agent, or agency
ducting the hearing or the Board in its discretion
any time prior to the issuance of an order based
reon. The person so complained of shall have the
ht to file an answer to the original or amended
nplaint and to appear in person or otherwise and
e testimony at the place and time fixed in the com-
int. In the discretion of the member, agent, or
ncy conducting the hearing or the Board, any other
son may be allowed to intervene in the said pro-
ding and to present testimony. Any such proceed-
shall, so far as practicable, be conducted in ac-
dance with the rules of evidence applicable in the
rict courts of the United States under the rules of
l procedure for the district courts of the United
tes, adopted by the Supreme Court of the United
tes pursuant to section 2072 of Title 28."

Section 160 (j)

"The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."

Section 160 (k)

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

Section 160 (l)

"(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(e)

this title or section 158(b) of this title, or section (e) of this title or section 158(b) (7) of this title, preliminary investigation of such charge shall be de forthwith and given priority over all other cases ept cases of like character in the office where it is d or to which it is referred. If, after such inves- ation, the officer or regional attorney to whom the tter may be referred has reasonable cause to believe h charge is true and that a complaint should issue, shall, on behalf of the Board, petition any United tes district court within any district where the air labor practice in question has occurred, is al- ed to have occurred, or wherein such person resides transacts business, for appropriate injunctive relief nding the final adjudication of the Board with re- ct to such matter. Upon the filing of any such ition the district court shall have jurisdiction to nt such injunctive relief or temporary restraining er as it deems just and proper, notwithstanding other provision of law: *Provided further*, That temporary restraining order shall be issued with- notice unless a petition alleges that substantial irreparable injury to the charging party will be voidable and such temporary restraining order ll be effective for no longer than five days and l become void at the expiration of such period: *ovided further*, That such officer or regional at- ney shall not apply for any restraining order under tion 158(b) (7) of this title if a charge against employer under section 158(a) (2) of this title has n filed and after the preliminary investigation, he reasonable cause to believe that such charge is e and that a complaint should issue. Upon filing any such petition the courts shall cause notice reof to be served upon any person involved in the rge and such person, including the charging party,

shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Since our petition sets forth fully the considerations that support the grant of certiorari in this case, in this reply we merely underscore the principal errors of omission and commission in respondent's brief in opposition.[1]

1. The quality of respondent's arguments is typified by respondent's effort to distinguish *Piedmont Aviation, Inc. v. Air Line Pilots Ass'n*, 416 F.2d 633 (4th Cir. 1969), the decision that the Court of Appeals in the case at bar found squarely in conflict with its own. Respondent charges the

[1] We pass over respondent's lengthy statement of facts, not because it is accurate, but because it is for the most part irrelevant. The only relevant facts are those stated in the Court of Appeals' opinion, from which the statement in our petition is drawn.

court below with "an obvious inadvertent misinterpretation of the *Piedmont* case" (Opp. p. 28). Respondent contends, contrary to the view of the court below, that the Fourth Circuit in *Piedmont* did not hold that a violation of Section 2 First would support a strike injunction, but that rather the Fourth Circuit's view in that respect was simply dictum (Opp. pp. 28-30). Respondent says that is so because the Fourth Circuit instructed the District Court to consider, on the hearing on the final injunction, not only whether the union had violated Section 2 First but also whether the dispute was a "minor dispute" as to which the union would not in any event be entitled to strike.

Respondent's conception of "dictum" and "holding" is strange. In *Piedmont*, the Court of Appeals commenced its opinion by noting that "the district court . . . granted an interlocutory injunction restraining its pilots from continuing a strike," and by then stating, "we affirm the district court." 416 F.2d at 635. The preliminary injunction thus affirmed by the Court of Appeals had been granted on the ground that the union had probably "failed to negotiate in good faith" and thereby violated Section 2 First. *Id.* at 637. Accordingly, the Court of Appeals was called upon to decide, and did decide, whether the district court had jurisdiction to enter an injunction on that ground. It did not refrain from deciding the issue and remand the case for the district court to consider whether the preliminary injunction could be based upon a finding that the dispute was a "minor" dispute. It simply instructed the district court to consider that possibility when the time came for entry or denial of a *permanent* injunction. All of this is perfectly clear from the Fourth Circuit's opinion. It is respondent, not the court below, that has fallen into an "obvious inadvertent misinterpretation" of that opinion.

2. As to respondent's discussion of this Court's decisions (Opp. pp. 15-27), there is no need to add to what we have already said. We simply point out again that in *Virginian Ry. v. System Federation*, 300 U.S. 515, 544-545 (1937),

this Court explicitly declined to follow *Pennsylvania R.R. System Federation v. Pennsylvania R.R.*, 267 U.S. 203 (1925), which had held that the predecessor of Section 2 First was not justiciable. Instead, as respondent concedes (Opp. p. 25), this Court affirmed an injunction which "incorporated" the requirements of Section 2 First; and in so doing this Court expressly rejected the argument that Section 2 First is not justiciable. It is of course true that *Virginian* did not involve a strike injunction. But it did involve an injunction which could not have been sustained in full if, as respondent urges and the court below held, Section 2 First is not justiciable. And *Virginian* has never been overruled or even questioned in this Court's subsequent opinions. To the contrary, it has been endorsed (Pet. pp. 21-23).[2]

3. Respondent devotes some 17 pages (Opp. pp. 32-49) to an attempt to distinguish the lower court cases in addition to *Piedmont* that we cited in our petition as being contrary to the decision below respecting the justiciability of Section 2 First. Those cases are accurately described in our petition, and we will not extend the pleadings by repeating those descriptions. We simply make the the following observations. First, the bulk of respondent's lengthy discussion seems designed to show that many of these cases did not involve strike injunctions. That, of course, is quite true, as we made clear in our petition. However, each of them did involve in one way or another the question whether Section 2 First is justiciable; and taken together the cases constitute an impressive body of authority for the proposition that that provision is justiciable. Respondent does not, and cannot, show the contrary, no matter how microscopically the cases are examined. Second,

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[2]The decisions collected by respondent in which this Court has held that the parties may engage in "self-help" after the requirements of the Railway Labor Act have been exhausted (Opp. pp. 26-27) did not, of course, involve the question whether compliance with Section 2 First is one of those requirements.

a number of the cases did involve strike injunctions issued after exhaustion of the formal procedures of the Act (Pet. pp. 13-14, 15). As to some of these decisions, respondent, while conceding that such injunctions were issued, maintains that the justiciability of Section 2 First "was not considered or decided in any of those cases" (Opp. p. 44). But the opinions, which are quoted in part in our petition (pp. 15-16), clearly show that respondent is wrong on that score. Third, respondent is also wrong in asserting that in other decisions of this sort cited in our petition the courts "reached no conclusion on the issue of good faith bargaining by the union" (Opp. p 39). In that category, for example, respondent places *International Ass'n of Machinists v. National Railway Labor Conference*, 310 F. Supp. 905 (D.D.C. 1970) (Pet. p. 13, Opp. p. 39). Here again, we simply invite the Court's attention to the opinion in that case, in which after a detailed analysis the court concluded:

> "The duty laid out in Section 2 First is 'the heart of the Railway Labor Act.' *Railroad Trainmen v. Terminal Co.*, supra, 394 U.S. at 377-378, 89 S. Ct. at 1115. By initiating and negotiating the dispute on an obligatory national basis and then striking the carriers on an individual basis it seems clear that the unions have violated their duty to 'exert every reasonable effort to make . . . agreements . . . and settle disputes.' Having begun on a national basis, it is incumbent upon the parties to continue to deal on a national level even after the procedures of the Railway Labor Act have been exhausted. To act otherwise would take on the character of bad faith bargaining." *Id.* at 912.

3. Finally, we note that respondent does not touch upon the legislative history supporting the justiciability of Section 2 First (Pet. pp. 25-26), or upon the legislative history that demonstrates that the Congress did not intend the National Mediation Board to be put in the position of adjudicating questions of bad faith bargaining (Pet. pp. 30-33), or upon the administrative practice of the Board that shows it has never undertaken to make that sort of determination

(Pet. pp. 28-30). Each of these considerations strongly supports our petition.

Conclusion

For the reasons stated herein and in the petition, certiorari should be granted.

August 11, 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (App. 210-229) is reported at 422 F.2d 979. The findings of fact, conclusions of law, and judgment of the District Court (App. 200-207) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 6, 1970 (App. 230). The petition for a writ of certiorari was filed on May 26, 1970 and was granted on October 12, 1970. 39 *U.S. Law Week* 3131. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Petitioner railroad sought an injunction against a strike by respondent union on the ground that the union had not satisfied the "major disputes" requirements of the Railway Labor Act (45 U.S.C. §§ 151-160). The railroad charged that, while the union had purported to comply with the provisions of that Act respecting conferences (Section 6, 45 U.S.C. § 156) and mediation (Section 5, 45 U.S.C. § 155), it had not substantially fulfilled either those obligations or its duty under Section 2 First of the Act (45 U.S.C. § 152 First), because it had not within the meaning of this last provision "exert[ed] every reasonable effort to make and maintain agreements . . . and to settle all disputes." The question presented is whether the courts have jurisdiction to entertain such a claim.

STATUTES INVOLVED

The statutory provisions principally involved are Sections 2 First, 5 First, and 6 of the Railway Labor Act. They provide as follows:

Section 2 First (45 U.S.C. § 152 First):

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising

out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 5 First (45 U.S.C. § 155 First):

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period

the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

Section 6 (45 U.S.C. § 156):

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

STATEMENT

The single issue presented in this case is whether the courts have jurisdiction to entertain claims based on Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First), the so-called "good faith bargaining" provision. The lower courts held that they were without jurisdiction and therefore never reached the further question whether in fact there had been a violation of that provision in the case at bar. In

these circumstances, the essential facts are simply these:

Petitioner Chicago and North Western Railway Company (the "C&NW") sued in District Court to enjoin a strike threatened by respondent United Transportation Union (the "UTU").[1] By the time of the suit, the National Mediation Board, acting pursuant to Section 5 of the Railway Labor Act, had terminated its services respecting the labor dispute between the parties, and the prescribed 30-day "cooling off" period had expired (45 U.S.C. § 155). However, the C&NW claimed that the UTU had not met the prerequisites to a lawful strike because it had not, within the meaning of Section 2 First of the Act, "exert[ed] every reasonable effort" to resolve its dispute with the railroad. Accordingly, the C&NW maintained, there had been only ostensible, not real, compliance by the UTU with the obligations imposed by the Act for conferences between the parties and mediation of the dispute (45 U.S.C. §§ 155, 156). After a preliminary injunction hearing during which the C&NW introduced its evidence, the District Court granted the UTU's motion to dismiss on the ground that the duties laid upon the parties by Section 2 First are enforceable exclusively by the National Mediation Board and not in any respect by the courts. The Court of Appeals affirmed on the same ground. This Court granted certiorari to determine the correctness of that holding.

In more detail, the background of this litigation is as follows:

1. *The 1965 Section 6 notices.* The dispute between the parties concerns how many brakemen should be

[1] Jurisdiction was grounded upon 28 U.S.C. §§ 1331, 1337.

employed on the C&NW's trains—the "crew consist" controversy. In 1965, the UTU served upon the C&NW notices under Section 6 of the Railway Labor Act proposing that not less than two brakemen be employed on every crew. Under that proposal, an additional brakeman would be required on some 200 crews at a cost of close to $2,000,000 annually. The C&NW responded by serving notices proposing that crew size be determined by management. (App. 5-6, 31, 32, 48-54, 56, 106.)

2. *Antecedents of the dispute.* The 1965 dispute had its origins in a similar dispute that arose in 1959-1960. At that time, the nation's railroads and the unions representing operating employees had exchanged notices respecting "manning" issues, including the use of firemen on diesel locomotives and the number of brakemen required on trains.[2] In 1961, the President appointed a special commission to help resolve this abrasive controversy. After extensive hearings, the Presidential Railroad Commission found that all fireman and many brakeman positions were unnecessary, and that accordingly the railroads should be free to reduce their work forces if certain protections were extended to existing employees. *Report of the Presidential Railroad Commission* (1962), pp. 21-63. While the railroads accepted the Report, the unions rejected it. (App. 12-14.)

Subsequent mediation by the National Mediation Board proved unsuccessful, and the carriers announced that they intended to put their proposals into effect.

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[2] There were then five unions of operating employees. On January 1, 1969, all but the Brotherhood of Locomotive Engineers merged into respondent UTU (App. 12). For simplicity we refer herein only to the UTU.

The unions' legal effort to block that action ended when this Court held that the parties were free to resort to "self-help" because the procedures of the Act had been exhausted. *Brotherhood of Locomotive Eng'rs* v. *Baltimore & O. R.R.*, 372 U.S. 284 (1963). The President then appointed an emergency board under Section 10 of the Act (45 U.S.C. § 160). Neither that board nor the Secretary of Labor, who tried to mediate, could bring about a settlement. The President then sought, and the Congress enacted, compulsory arbitration legislation. 77 Stat. 132 (1963). (App. 14-16.)

Arbitration Board No. 282, which was established pursuant to the legislation, authorized each railroad to eliminate 90% of fireman positions and to institute local negotiation, and if necessary local arbitration, for eliminating brakeman positions. National guidelines were established to govern the crew consist negotiations and arbitrations, and generous protection was provided for existing employees.[3] Pursuant to this award, some 8,000 brakeman positions were eliminated across the country.[4] On the C&NW, agreements and arbitrations authorized the operation of about 200

[3] In the decision upholding the validity of the award, the District Court, in an opinion adopted by the Court of Appeals, observed that the "board displayed extreme consideration and even benevolence for the future of employees in regular service," and that the "well-reasoned opinion of the board convincingly shows that the board thoroughly weighed the evidence and that there was a rational basis for its conclusions." *Brotherhood of Locomotive Fire. & Eng.* v. *Chicago, B. & Q. R.R.*, 225 F. Supp. 11, 18 (D. D.C.), *aff'd*, 331 F.2d 1020 (D.C. Cir.), *cert. den.*, 377 U.S. 918 (1964).

[4] Some 18,000 fireman positions were also eliminated. See *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581, 591 (D.C. Cir. 1967).

crews with one, rather than two, brakemen. While some of these positions had to be held open for protected employees, just before this suit the C&NW was operating some 179 crews with a single brakeman, thereby realizing savings at a rate of over $1,500,000 a year. (App. 16-17, 29-31, 55-56; Tr. 75.)

3. *The UTU's attack on the rules established by Award 282.* The UTU pursued two avenues in its effort to win back the positions lost as a result of Award 282. First, the UTU contended that, upon the expiration of the award on January 25, 1966, the old crew consist rules would automatically revive so that the railroads would be obliged to restore some 8,000 brakeman positions immediately. However, the courts rejected this argument, holding that the rules established under the award survived its expiration and could be changed only in the manner prescribed by the Railway Labor Act. *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581 (D.C. Cir. 1967). (App. 19-20.)[5]

Second, prior to the expiration of the Award, the UTU served upon a large number of railroads Section 6 notices calling for a second brakeman on virtually all crews.[6] Such a notice was served on the

[5] A similar ruling was made respecting the fireman issue. The fireman controversy thereafter followed a different course than the crew consist dispute, and since it is not relevant here we will not further refer to it.

[6] The railroads took the position that bargaining over the UTU's new crew consist notices was not obligatory until after the expiration of the award. In the *Akron & B.B. R.R. case, supra*, the court held that by adopting this position the railroads had "failed to make every reasonable effort to settle" the dispute in violation of Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108). 385 F.2d at 594-99. The UTU contended below that this violation in

C&NW and triggered the dispute that ultimately led to this litigation. Upon service of their counter-notices, the carriers proposed national negotiations in accord with past practice respecting similar national crew consist disputes, but the UTU insisted upon negotiations on a carrier-by-carrier basis. The UTU's acknowledged purpose in repudiating national handling was to insure that the procedures of the Railway Labor Act would be exhausted on different railroads at different times so that the UTU would be able to engage in a sequence of "whipsaw" strikes against individual railroads—an especially effective weapon against the railroads in view of the intensive competition in the transportation industry, the inability of railroads to build up in advance of a strike an "inventory" of their product, and the precarious financial condition of the carriers. (App. 18-19, 31-32; J. E. Wolfe Aff. ¶ 40.)

When the UTU had exhausted the formal procedures of the Act upon three railroads, those railroads sued to enjoin a threatened strike on the ground that the UTU had violated the Act by refusing to engage in national negotiations. The UTU argued that local negotiations were necessary to take into account local considerations, such as the characteristics of the terrain, the equipment, the climate, and the service, which, it said, were controlling in determining

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1965 barred injunctive relief in the case at bar, while the C&NW argued, among other things, that the violation had long since been purged. See *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R., supra*, 385 F. 2d at 614; *Rutland Ry.* v. *Brotherhood of Locomotive Eng'rs*, 307 F.2d 21, 41 (2d Cir. 1962); *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n*, 416 F.2d 633, 636 (4th Cir. 1969). The lower courts never reached the question, and it is not pertinent to the issue presented here.

crew size. (App. 25; J. E. Wolfe Aff. ¶ 62.) The District Court enjoined the strike and found that the union's "purpose in avoiding negotiations on a national basis" was to further its "plan . . . to isolate every railroad and call separate strikes, one at a time, in order to achieve . . . [its] ultimate objective, step by step." *Atlantic C.L. R.R.* v. *Brotherhood of R.R. Trainmen,* 262 F. Supp. 177, 186-87 (D.D.C. 1967). The Court of Appeals reversed, holding that while national handling was obligatory in disputes which admitted of national resolution, this dispute could not be handled successfully on a national basis, because the many differences among railroads relevant to the appropriate size of crews precluded the adoption of nationally uniform crew consist rules. 383 F.2d 225 (D.C. Cir. 1967), *cert. den.,* 389 U.S. 1047 (1968).

Thus armed with the "whipsaw strike" weapon, the UTU at one time or another in the 1968-69 period struck the Missouri Pacific Railroad, the Texas & Pacific Railroad, the Atlantic Coast Line Railroad, the Belt Railway of Chicago (for 101 days), the Illinois Central Railroad, and the Louisville & Nashville Railroad (twice); and a strike against the Northern Pacific Railroad was averted by a restraining order.[7]

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[7] The strike against the Belt Railway of Chicago, as well as the first strike against the Louisville & Nashville, was halted by the appointment of Emergency Board No. 172 to investigate the disputes involving those carriers and the Illinois Central. The Board, in its Report of December 13, 1968, did not evaluate the merits of the dispute, but urged renewed negotiations. The second strike against the Louisville & Nashville, as well as the strike against the Illinois Central and the threat against the Northern Pacific, followed successively. Each of these carriers sought injunctions, alleging a breach by the UTU of Section 2 First of the Act; but in each instance the litigation was mooted by settlement prior to a preliminary injunction decision. In *Louisville & N.*

One by one most of the country's railroads capitulated to the UTU's uniform demand and surrendered the important benefits realized under Award 282. In short, the UTU demanded and obtained what it had claimed in the *Atlantic Coast Line* litigation would not be practical: the establishment upon most of the nation's railroads of a substantially uniform crew consist rule, a rule under which the norm is, once again, a minimum of two brakemen. (App. 25-28, 79-81, 101-103.)

4. *Events on the C&NW.* On the C&NW, as on other railroads, the union in initial conferences refused to engage in national handling of the parties' 1965 notices. Negotiations did not resume until the termination in 1968 of the *Atlantic Coast Line* litigation, in which the UTU's right to insist upon local negotiations was sustained. After fruitless efforts by a mediator, on October 8, 1969 the National Mediation Board proffered arbitration, as it is required to do by Section 5 of the Act when its "efforts to bring about an amicable settlement . . . [are] unsuccessful." The C&NW accepted arbitration, but the UTU declined. Accordingly on October 16, 1969 the Board, again as required by Section 5, terminated its services. During discussions held shortly before the end of the 30-day *status quo* period prescribed by Section 5, the UTU indicated it would strike unless

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R.R. v. *United Transportation Union*, Civil Action No. 5284 (M.D. Tenn. 1969), a restraining order was granted and an evidentiary hearing held on the preliminary injunction motion. In *Northern Pac. Ry.* v. *United Transportation Union*, No. 3-69 Civil 217 (D. Minn. 1969), a restraining order was issued, but no preliminary injunction hearing was held. In *Illinois Central R.R.* v. *United Transportation Union*, Civil Action No. 5378 (M.D. Tenn. 1969), a restraining order was denied, but not on jurisdictional grounds.

the C&NW agreed to its demands. The C&NW then brought this action. (App. 32-35, 44-47, 107-108, 124, 140-142.)

5. *The litigation.* The C&NW instituted suit on November 19, 1969 (App. 1). As we have noted, by this time the formal procedures of the Railway Labor Act—conferences, mediation by the National Mediation Board, proffer of arbitration, termination of mediation, and expiration of thirty days thereafter—had ended. The C&NW contended, however, that the UTU had not discharged its most important obligation under the Act respecting negotiation and mediation because it had not fulfilled the "duty" imposed by Section 2 First "to exert every reasonable effort" to settle the dispute. (App. 5-8, 60-62.)

The District Court issued a temporary restraining order (App. 57) and took evidence in support of the C&NW's motion for a preliminary injunction. Since neither the District Court nor the Court of Appeals decided whether that evidence would have established, if not rebutted, a probable violation of Section 2 First, and since the sufficiency of that evidence is not pertinent to the issue presented here, we will not pause to examine the lengthy record in detail. In brief, however, the C&NW alleged that the following acts of the UTU, singly or together, established a violation of the Act:

First, the UTU had refused *even to discuss* the C&NW's Section 6 proposal to permit a reduction of crew size in main line freight service (App. 7, 37-39, 46-47, 61, 118, 122, 137, 148). The UTU's aim was to restore positions in branch line and yard service that had been eliminated pursuant to the Award of Arbitration Board No. 282. Had the UTU been willing to

make concessions respecting the C&NW's desire to reduce main line crews, a possible basis for compromise might have emerged. But the UTU was not willing to negotiate about main line crews at all. A refusal to negotiate about any substantial element of a party's proposal constitutes a breach of the good faith bargaining obligation. See *Brotherhood of Ry. Clerks* v. *Atlantic C.L. R.R.,* 201 F.2d 36, 39 (4th Cir. 1953); *United Steelworkers* v. *NLRB,* 390 F.2d 846 (D.C. Cir. 1968).

Second, when the C&NW proposed to pay additional compensation—about $1,000 a year—to brakemen if the union permitted retention of smaller crews, the UTU wrote back that it was "not willing to enter into negotiations on such a proposal" (App. 33-34, 108-109, 115, 192-194). But, the C&NW urged, the law obliges the parties at least to consider "every proffer of a new solution to a problem." *Cf. Pullman Co.* v. *Order of Ry. Conductors,* 316 F.2d 556, 563 (7th Cir. 1963). Moreover, UTU convention action forbade its negotiators to entertain this C&NW compromise proposal (App. 33-34). Such a restriction has been held to violate Section 2 First. *Piedmont Aviation Inc.* v. *Air Line Pilots Ass'n,* 416 F.2d 633, 637 (4th Cir. 1969).

Third, the evidence established that the UTU maintained throughout negotiations the wholly intractable attitude that, whatever relevant considerations might be advanced by the C&NW, the C&NW would have to agree to the same terms as had other railroads (*e.g.,* App. 27, 33, 35-47, 61-62, 80-81, 111-143). Thus, as the District Court found, "[t]he evidence shows that at all times the defendant has taken the position that the only agreement that could be reached was and is that reached by nearly all of the railroads in the

United States with defendant, which requires a restoration of approximately 95% of all of the jobs in question" (App. 204). This unyielding insistence upon a uniform national rule regardless of local considerations demonstrated "an attitude of 'take it or leave it'" (*NLRB* v. *Insurance Agents' Int'l Union,* 361 U.S. 477, 485 (1960)), and a "predetermined resolve not to budge from an initial position" (*NLRB* v. *Truitt Mfg. Co.,* 351 U.S. 149, 154 (1956) (Frankfurter, J., concurring)), which are not consonant with good faith bargaining. This attitude, the C&NW contended, was particularly censurable because the UTU had successfully argued in the *Atlantic Coast Line* litigation that negotiation on the basis of *local* considerations was crucial to a resolution of the dispute. Thus, the C&NW urged, the UTU's strategy from the start had been to secure a judicial decision requiring local negotiation, not in order to permit genuine bargaining on the basis of local conditions, but rather to enable the UTU to employ whipsaw strikes to force upon each railroad a uniform national rule.

At the conclusion of the C&NW's evidence, the District Court granted the UTU's motion to dismiss on the ground that the National Mediation Board has exclusive jurisdiction to determine whether the parties to a dispute have complied with Section 2 First (App. 200-207). Recognizing, however, that this holding was at odds with decisions of other federal courts (Tr. 526), the District Court granted an injunction pending appeal (App. 4).

After an expedited hearing,[8] the Court of Appeals

[8] The District Court judgment was entered December 11, 1969 (App. 200, 207). After full briefing, oral argument in the Court of Appeals was had on January 7, 1970 (App. 208-209).

affirmed.[9] The Court of Appeals agreed with the C&NW that Section 2 First "was intended to play an integral part in facilitating the other more specific procedures of the Railway Act" and that "the role of the Mediation Board is basically a non-adjudicatory one." However, the court believed that "for the procedures of the Act to be effective, the Mediation Board must accept in certain instances a limited 'quasi adjudicatory' posture," and concluded that "the role of determining whether 'reasonable effort' is being practiced by the parties is not a judicial one but a role which should be left to the National Mediation Board" (App. 222-229).

> "[W]e interpret § 2, First, to confer on the Board pursuant to its express mediatory power, the power, whether it may be considered adjudicatory or quasi adjudicatory, to make sure the parties are exercising every reasonable effort" (App. 227).

The court acknowledged that in *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n,* 416 F.2d 633 (1969), the Court of Appeals for the Fourth Circuit had rendered "a holding opposite to our conclusions," but it said that it could ". . . not agree with the Fourth Circuit decision" (App. 228).

The court stayed its mandate—thereby leaving the interlocutory strike injunction in effect—pending proceedings in this Court.

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[9] The UTU appealed from the injunction pending appeal (App. 4), and the Court of Appeals affirmance of that order is the subject of the UTU's petition for certiorari in No. 190.

SUMMARY OF ARGUMENT

The issue presented is whether the federal courts have jurisdiction to decide a claim by a railroad that a strike threatened by a union should be enjoined because the union had failed to discharge its "duty" under Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First) to "exert every reasonable effort" to resolve the dispute between the parties, and thereby had failed to comply with its statutory obligations respecting conferences and mediation in "major disputes" under Sections 5 and 6 of the Act (45 U.S.C. §§ 155, 156).

If Section 2 First imposes judicially enforceable obligations, then a strike prior to compliance by the union with those obligations could be enjoined notwithstanding the Norris-LaGuardia Act (29 U.S.C. §§ 101 *et seq.*); for it is settled that Norris-LaGuardia does not bar injunctions against strikes that are illegal under the Railway Labor Act. "[T]he specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act." *Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R.R.*, 353 U.S. 30, 41-42 (1957). See cases cited *infra* pp. 24-26. However, the Court of Appeals below held that Section 2 First is not enforceable by the courts, but only by the National Mediation Board in the exercise of an "adjudicatory or quasi adjudicatory" power. This decision is not reconcilable with prior decisions of this Court, particularly *Virginian Ry.* v. *System Federation,* 300 U.S. 515 (1937); with the settled view of Section 2 First reflected in a large body of lower court decisions; or with the language, legislative history, or policy of the Railway Labor Act.

1. The Railway Labor Act was enacted in 1926 in order to promote tranquil labor relations by the establishment, among other things, of legally enforceable obligations. The Congress was prompted to act by the ineffectiveness of the Transportation Act of 1920, under which the force of public opinion was the only sanction. *Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks*, 281 U.S. 548, 562 563 (1930). This general legislative purpose was reflected in a specific way by employment of the phrase "It shall be the duty" in Section 2 First. Those are words of command, not of exhortation. On the other hand, nothing in the Act suggests that the command was to be enforced by the National Mediation Board rather than by the judiciary. In defining the mediatory role of the Board, the Congress simply directed it to "use its best efforts" to bring the parties to agreement, to "endeavor . . . to induce the parties to submit their controversy to arbitration" if its efforts "shall be unsuccessful," and to "notify both parties in writing that its mediatory efforts have failed" if arbitration is refused. Section 5 First (45 U.S.C. § 155 First.)

2. The legislative history of the Act confirms what is evident from the face of the statutory language. The Act was drafted by a committee representing both railroads and unions. The principal union spokesman, Donald R. Richberg, in explaining the bill to the Congress, said that Section 2 First imposes "a legal duty"; that "it would be possible to obtain judicial power" to enforce that duty; that "the law of such enforcement or compulsion [would] be developed in the courts, according to the old common law theory of letting the courts develop the law after the obligations are clearly understood"; and that, in sum:

"[T]he legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate violation of that legal obligation could be prevented by court compulsion." See legislative history extracts *infra* p. 36 n. 13.

As to the Mediation Board, both Mr. Richberg and Mr. A. P. Thom, the principal railroad spokesman, repeatedly stressed that, because the adjudicatory role of the Railroad Labor Board under the Transportation Act of 1920 had undermined the Board's effectiveness, the function of the new mediation Board was to be confined to conciliation. It was not to "render any decision," to "make findings," or to be a "sort of super-labor board." As Mr. Thom put it, "The board of mediation has no right to make findings; they have only the function of conciliation and persuasion . . . ." See legislative history extracts *infra* p. 39 n. 14.

3. The importance of Section 2 First in the framework of the statute requires that it be enforceable. "[T]he major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks,* 281 U.S. 548, 565 (1930). That machinery consists of "rather elaborate . . . [provisions] for negotiation, mediation, voluntary arbitration, and conciliation." *Detroit & T.S.L. R.R.* v. *United Transportation Union,* 396 U.S. 142, 148-149 (1969). Because Section 2 First is central to the effectiveness of these provisions, it is "[t]he heart of the Railway Labor Act." *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 377-378 (1969). While the various other provisions of the Act provide for conferences, mediation, emergency board hearings, and

"cooling off" periods, in terms these requirements are simply procedural. It is Section 2 First that infuses them with substantive content. Because of that provision, as this Court noted in *Elgin, J. & E.R.R.* v. *Burley,* 325 U.S. 711, 721-722 n. 12 (1945), the obligation to negotiate under the Act "is not merely perfunctory. Good faith exhaustion of the possibility of agreement is required to fulfill it." Thus, Section 2 First must be enforceable if the statute is to fulfill its purpose.

But enforcement of this crucial statutory provision by the National Mediation Board would be inadequate. The Board's jurisdiction extends only to the mediation stage of the dispute. Thus the Board is powerless to hold the parties to their Section 2 First obligations during the conferences that precede mediation (Section 6) and during all the stages that follow mediation—the 30-day "cooling off" period after the Board's surrender of jurisdiction under Section 5, the 30 days allotted under Section 10 to emergency board hearings in important disputes, the second 30-day "cooling off" period following an emergency board report, and thereafter. And yet it is during these final stages that the necessity for good faith bargaining is most acute.

Moreover, the only "sanction" available to the Board would in many situations promote, rather than prevent, strikes. Thus, where the carrier is not bargaining in good faith on a union proposal, or a union on a carrier proposal, the Court of Appeals suggested that the Board could "release jurisdiction of the dispute and allow the procedures of the Act to be exhausted in order to allow for self-help" (App. 225 n. 12). As this passage makes evident, this would simply

free the union for an early strike in the one situation and the carrier for an early implementation of its proposals—which would almost surely produce a strike in any important case—in the other. But the aim of the Act is that honest negotiations are to be required so that strikes may be avoided. Giving the innocent party the right to engage in economic warfare, rather than the right to secure meaningful negotiations, is hostile to that aim.

4. The decision of the Court of Appeals cannot be reconciled with the decisions of this Court.

a. *Virginian Ry.* v. *System Federation*, 300 U.S. 515 (1937), is controlling. There this Court affirmed the validity of an injunction that directed a carrier both to "treat with" the union, in the language of Section 2 Ninth, and "to exert every reasonable effort to make and maintain agreements" with the union, in the language of Section 2 First. The argument that Section 2 First is not justiciable was squarely made and squarely rejected. This Court concluded that the Act "requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First." *Id.* at 548.

b. All other references by this Court to Section 2 First and to *Virginian* are in accord. The many relevant opinions are cited *infra* pp. 52-54. They are typified by a passage in *Elgin, J. & E.R.R.* v. *Burley*, 325 U.S. 711, 721-722 n. 12 (1945), where the Court, citing Section 2 and *Virginian*, said that "one of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all

parties . . . to negotiate," and that "[t]his duty is not merely perfunctory," but rather that "[g]ood faith exhaustion of the possibility of agreement is required to fulfill it."

c. In three other Railway Labor Act decisions, this Court held provisions of the Act judicially enforceable on the ground that the Congress intended to depart from the scheme of the Transportation Act and to establish enforceable obligations; that the provisions were written in mandatory terms; that their enforcement was essential to the effective operation of the statute; and that in these circumstances the absence of any specifically prescribed penalty was not controlling. *Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks,* 281 U.S. 548 (1930); *Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R.R.,* 353 U.S. 30 (1957); *International Ass'n of Machinists* v. *Central Airlines, Inc.,* 372 U.S. 682 (1963). (In one, the *Chicago R. & I.R.R.* case, the relief approved was a strike injunction.) The same principles of statutory construction are applicable here.

d. The decision cited by the lower court, *General Committee* v. *Missouri-K.-T. R.R.,* 320 U.S. 323 (1943), is not in point. There, the Court held simply that, with respect to representational disputes, all provisions of the Act must be read in light of Section 2 Ninth (45 U.S.C. § 152 Ninth), which establishes a comprehensive program for the resolution of such disputes. Since Section 2 Ninth expressly confers jurisdiction over those disputes on the National Mediation Board, and since that jurisdiction, as this Court construed the statute, was designed to be exclusive, the more general provisions, such as Sections 2 First and 2 Second, could not "make justiciable what otherwise

is not." *Id.* at 334. But that obviously does not mean that claims under Section 2 First that do *not* relate to representational disputes are not justiciable. *Virginian* held that they are; and this Court did not in *Missouri-K.-T.* suggest it was making any inroads on *Virginian*.

e. In *Brotherhood of R.R. Trainmen* v. *Toledo, P. & W.R.R.*, 321 U.S. 50 (1944), this Court enforced against a railroad the provision of the Norris-LaGuardia Act—Section 8 (29 U.S.C. § 108)—that is written in terms identical to Section 2 First. If the "reasonable efforts" standard of Section 8 is capable of judicial enforcement against carriers, then so too is the "reasonable efforts" standard of Section 2 First capable of judicial enforcement against unions as well as carriers.

5. The lower courts, generally relying upon *Virginian*, have established a large body of case law affirming the judicial enforceability of Section 2 First both in strike injunction suits and in other contexts. As one court concisely put it, "[T]he courts have enjoined . . . threatened and impending strikes in major disputes where good faith bargaining has not taken place in the manner and to the extent required by the Act . . . ." *Southern Ry.* v. *Brotherhood of Locomotive Fire. & Eng.*, 223 F. Supp. 296, 305 (M.D. Ga. 1962), *aff'd on basis of opinion below*, 324 F.2d 503 (5th Cir. 1963). The cases are discussed in full at pp. 61-70 *infra*. In addition to the Fourth Circuit decision acknowledged by the lower court in the case at bar to be in conflict with its own, *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n*, 416 F.2d 633 (1969), they include numerous court of appeals and district court decisions in the Second, Fifth, and District of Columbia Circuits.

6. As the decisions above indicate, a determination that Section 2 First is judicially enforceable does not require any determination respecting the authority of the National Mediation Board to enforce Section 2 First. On the other hand, since it is so clear that the Congress intended Section 2 First to impose enforceable obligations, a determination that the courts do *not* have jurisdiction over Section 2 First claims requires as a practical matter the corollary conclusion that the National Mediation Board *does* have such jurisdiction. We have already indicated how neither the language of the statute, its legislative history, nor its purposes support the lower court's view that the Board has such an "adjudicatory or quasi adjudicatory" function. Moreover, the lower court is the first to suggest to the contrary. In describing the role of the Board, the courts have uniformly taken the view that, as this Court said just last Term, "[t]he Mediation Board has no adjudicatory authority with regard to major disputes, nor has it a mandate to issue regulations construing the Act generally." *Detroit & T.S.L. R.R.* v. *United Transportation Union,* 396 U.S. 142, 158-159 (1969). For a discussion of the relevant cases, see *infra* pp. 71-73. Moreover, the Board itself has consistently said that its role in major disputes is confined to informal conciliation. For the relevant passages from its Annual Reports, see *infra* pp. 74-75. Indeed, just last year the former Chairman of the Board indicated specifically that the Board did not decide Section 2 First questions, see *infra* p. 76 n. 30. The Board's position was clearly reflected in an *amicus curiae* brief in *Chicago, R.I. & P.R.R.* v. *Switchmen's Union,* 187 F. Supp. 581 (W.D.N.Y. 1960), where the United States not only argued that Section 2 First was justiciable but indicated that the Board was of

the view that the practice of the union under attack in that case was in fact contrary to the requirements of Section 2 First. See *infra* pp. 76-77. On the theory of this court below, in those circumstances the Board should never have terminated its jurisdiction over that dispute.

ARGUMENT

Before analyzing in detail the considerations relevant to the issue presented to this Court, we make some general observations about the character of that issue so that the Court may know at the outset what we conceive the real battleground to be. First of all, this strike injunction suit involves a construction of the Railway Labor Act, not of the Norris-LaGuardia Act. The issue is whether there is federal question jurisdiction under the Railway Labor Act, not whether injunctive jurisdiction has been withdrawn by virtue of Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104). That is so because the problem of accommodating the Railway Labor Act to the Norris-LaGuardia Act, at least insofar as relevant here, has already been resolved. The C&NW's claim is that the UTU has not exhausted all the requirements of the Railway Labor Act that govern the parties in the negotiation of so-called "major disputes"—disputes over changes in collective bargaining agreements. It is clear that "[w]hile the dispute is working its way through these stages, neither party may unilaterally alter the status quo." *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). See also, *e.g.*, *Detroit & T.S.L. R.R.* v. *United Transportation Union*, 396 U.S. 142, 148-50 (1969). And it is also settled that "the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-

LaGuardia Act." *Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R.R.*, 353 U.S. 30, 41-42 (1957). See also *Virginian Ry.* v. *System Federation*, 300 U.S. 515, 563 (1937); *Brotherhood of R.R. Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952); *Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330, 338-339 (1960); *Brotherhood of Locomotive Eng'rs* v. *Missouri-K.-T. R.R.*, 363 U.S. 528, 531 (1960); *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 210-11 (1962). These principles have frequently been called into play by the courts with respect to strike injunctions in major disputes prior to compliance with the provisions of the Railway Labor Act. See, *e.g.*, *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n*, 416 F.2d 633 (4th Cir. 1969); *Norfolk & P.B.L. R.R.* v. *Brotherhood of R.R. Trainmen*, 248 F.2d 34 (4th Cir. 1957); *Brotherhood of Locomotive Fire. & Eng.* v. *Bangor & A. R.R.*, 380 F.2d 570, 583 (D.C. Cir. 1967); *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581, 613 (D.C. Cir. 1967); *National Airlines, Inc.* v. *International Ass'n of Machinists*, 416 F.2d 998, 1002-03 (5th Cir. 1969); *Missouri-Illinois R.R.* v. *Order of Ry. Conductors*, 322 F.2d 793, 796 (8th Cir. 1963); *Seaboard World Airlines, Inc.* v. *Transport Workers*, 425 F.2d 1086, 1091-92 (2d Cir. 1970); *International Ass'n of Machinists* v. *NMB*, 425 F.2d 527, 536-37 (D.C. Cir. 1970); *Pennsylvania R.R.* v. *Transport Workers*, 202 F. Supp. 134, 137 (E.D. Pa. 1962); *Western Air Lines* v. *Flight Eng'rs Int'l Ass'n*, 194 F. Supp. 908, 910-911 (S.D. Cal. 1961); *Pennsylvania R.R.* v. *Transport Workers*, 191 F. Supp. 915, 921 (E.D. Pa.), *aff'd*, 280 F.2d 343 (3rd Cir. 1960); *Chicago, R.I. & P. R.R.* v. *Switchmen's Union*, 187 F. Supp. 581, 584 (W.D.N.Y. 1960), *rev'd on other grounds*, 292 F.2d 61 (2d Cir. 1961); *American Airlines,*

Inc. v. *Air Line Pilots Ass'n,* 169 F. Supp. 777, 783-789 (S.D.N.Y. 1958).

Next, it is also worthwhile considering at the start the relationship between the view of the court below respecting the jurisdiction of the National Mediation Board to enforce Section 2 First and the issue before this Court. That issue is whether *the courts* have jurisdiction to enforce Section 2 First, not whether the National Mediation Board has such jurisdiction. The issue could be resolved *in favor* of judicial enforcement without deciding whether, and to what extent, the National Mediation Board may have a role to play in holding the parties to their Section 2 First obligations. But on the other hand, as the opinion of the lower court clearly enough reveals, a decision *against* judicial enforcement of Section 2 First virtually requires as a corollary the conclusion that the Board must settle Section 2 First issues. That is so because it is very plain that the Congress intended Section 2 First to be enforced *by someone.* Thus the lower courts did not hold—and the UTU did not argue—that Section 2 First is merely a legislative exhortation unenforceable by any organ of government. To the contrary, the Court of Appeals, noting that this Court has characterized "the duty, imposed by § 2 First" as the "heart of the Railway Labor Act," *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 377-378 (1969), viewed the provision as having been "intended [by Congress] to play an integral part in facilitating the other more specific procedures of the Railway Act" (App. 223).

In this brief, we will show that the Court of Appeals erred both in its holding—all relevant considera-

tions establish that, whatever may be said about the Mediation Board, the courts do have the obligation to enforce Section 2 First—and in its corollary conclusion—all relevant considerations also establish that the Board does not share that obligation. While in our view the decision of this Court in *Virginian Ry. v. System Federation,* 300 U.S. 515 (1937), is controlling, the Court of Appeals thought that decision distinguishable. Accordingly, we start our analysis at the beginning—the origins of the Railway Labor Act, its legislative history, and the significance of Section 2 First in the statutory scheme. An examination of these factors will show why this Court and all other courts except the lower courts in the case at bar have regarded Section 2 First as establishing a substantive rule of conduct subject to judicial enforcement.

I. THE LANGUAGE, LEGISLATIVE HISTORY, AND POLICY OF THE RAILWAY LABOR ACT ESTABLISH THAT THE COURTS, NOT THE NATIONAL MEDIATION BOARD, SHOULD ENFORCE SECTION 2 FIRST.

A. Antecedents of Section 2 First.

The predecessor of the Railway Labor Act of 1926 was the Transportation Act of 1920 (41 Stat. 456). That statute provided for termination of the federal control of the railroads that had been undertaken during World War I and also established procedures respecting the handling of railway labor disputes. Two features of the legislation are pertinent. First, the Act established a governmental agency, the United States Railroad Labor Board, whose role, as we shall see later, was examined by the Congress in connection with defining the functions of what is now the National Mediation Board. And second, the Transportation Act contained in Section 301 (41 Stat. 469) the forerunner

of Sections 2 First and 2 Second of the Railway Labor Act.

Both of these aspects of the legislation—the role of the Railroad Labor Board and the significance of Section 301—were examined by this Court in two cases involving a continuing struggle between a union and the Pennsylvania Railroad Company. At heart, that struggle was one for recognition of the union. In the first case, this Court held that the Railroad Labor Board had authority to prescribe rules for the selection of the employees' representatives that would be entitled to invoke the services of the Board. *Pennsylvania R.R.* v. *United States R.R. Labor Bd.*, 261 U.S. 72 (1923). The Court noted that the Board was a body empowered by the Congress to investigate railway labor disputes, to make "decisions" respecting them, and to "direct . . . public criticism against the party who, it thinks, justly deserves it." *Id.* at 79-80. In the performance of that statutory function, the Court held, the Board had the right to promulgate rules respecting the procedures that ought to be followed by the parties in determining who should speak for the employees.

Thereafter, however, the railroad ignored the rulings of the Board and entered into a contract with the union it preferred. The aggrieved union again brought suit, asserting that the company had breached the Act. Among other provisions of the Act, it cited Section 301, which provided in part:

> "It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate of-

ficials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. . . ." 49 Stat. 469.

This time, however, the union lost on the ground that, while the Board had the authority to decide that the railroad was not complying with the standards expressed in the Act, no one had the authority to compel the railroad to change its ways. *Pennsylvania R.R. System Federation* v. *Pennsylvania R.R.*, 267 U.S. 203 (1925). Under the statute, this Court held, the "sanction . . . of publication and public opinion, exists . . . and nothing else." *Id.* at 217. As to Section 301, language that might otherwise be thought to fasten upon the company a legally binding obligation to deal with duly designated employees' representatives fell under the weight of the legislative intent that infused the entire statutory scheme:

> ". . . The so-called mandatory language of Section 301 might, if that section were accompanied by a penalty for its violation or some other means of compulsion, and there were not the other provisions of the Title to help its construction, be given the force of a statutory obligation. . . . But when the other sections of the Title are taken as a whole, they may be searched in vain to find any indication in the mind of Congress or any intimation that the disputants . . . were in any way to be forced into compliance with the statute or with the judgments pronounced by the Labor Board, except through the effect of adverse public opinion." *Id.* at 216.

This, then, was the state of railway labor law when the 69th Congress considered the bill that became the

Railway Labor Act: an administrative board had bee constituted with the responsibility of "deciding" ho employees should choose their representatives and ho the companies and the employees should resolve thei disputes, but neither that board nor the courts ha been empowered to require anyone to do anything.

B. The Railway Labor Act of 1926—Its Terms.

In 1926 the Congress repealed the Transportatio Act of 1920 and enacted in its stead the Railwa Labor Act. 44 Stat. 577. The Congress acted "wit clear appreciation of the infirmity of the existing leg islation, and in the endeavor to establish a more pra ticable plan in order to accomplish the desired r sult. . . ." *Texas & N.O. R.R.* v. *Brotherhood Ry. Clerks,* 281 U.S. 548, 562-563 (1930). The legi lation created a wholly new scheme for dealing wit disputes in the railroad industry. In general, th Act contained provisions designed to secure the rig of employees to designate their bargaining represent tives and to require good faith bargaining on the pa both of those representatives and of the employe (Section 2); it provided for arbitration of "mino disputes" by boards of adjustment (Section 3); established, in place of the Railroad Labor Boar the Board of Mediation and defined its functions wit particularity (Sections 4 and 5); it prescribed th procedure to be employed by the parties in seekin changes in collective bargaining agreements (Sectio 6, 2 Second, 2 Fifth); it provided for voluntary arb tration of "major disputes" (Section 7); it authorize the President to appoint emergency boards to invest gate disputes that threatened to interfere with esse tial transportation service (Section 10); and it r quired the maintenance of the *status quo* while th

several requirements of the Act were being fulfilled (Sections 6 and 10).

The provisions with which we are here concerned—Section 2 First, Section 5, and Section 6—appeared in the 1926 legislation in terms that are substantially identical to today's statutory language. 44 Stat. 577-578, 580, 582.[10] Without regard to the legislative history of the statute, which we discuss in the next part of this brief, the statutory language is the strongest sort of evidence that Section 2 First was designed to impose enforceable obligations, but it affords no support whatever for the view that the National Mediation Board was to be the enforcer.

Consider the language of Section 2 First. By that section, the Congress declared that "[i]t shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes. . . ." Surely it is not lightly to be assumed that when the Congress says it is imposing a "duty" it means a moral rather than a legal obligation. The Congress ought to be taken at its word; and the phrase "shall be the duty" signals about as straightforward an invocation of the legislative authority to create enforceable rights and obligations as one can imagine.

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[10] In 1934 the Act was amended (48 Stat. 1185) to provide for compulsory arbitration of minor disputes (§ 3), resolution by the Mediation Board of representational disputes (§ 2 Ninth), increased freedom of employees to organize (§ 2 Fourth), maintenance of the *status quo* for 30 days after mediation in major disputes (§ 5), changing the name of the Board of Mediation to the National Mediation Board (§ 4), and reducing the number of board members from 5 to 3 (§ 4), all provisions which are not directly relevant to the issue here presented.

Next, consider the provisions relating to the National Mediation Board. There is nothing to suggest that the Board is to have any adjudicatory responsibility with respect to major disputes.[11] In the original Act, as now, there is only one paragraph that defines the mediatory function of the Board. That paragraph, which appears in Section 5 First, reads as follows:

> "... [T]he said board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable adjustment through mediation shall be unsuccessful, the said board shall at once endeavor as its final required action (except as provided in paragraph third of this section [respecting arbitration procedures] and in section 10 of this Act [respecting emergency boards]), to induce the parties to submit their controversy to arbitration in accordance with the provisions of this Act."

There is nothing in this language, or in any other provision of the Act, that affords any textual support for the conclusion of the Court of Appeals that the

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[11] The 1934 amendments, as we have noted (*supra* p. 31 n. 10), authorized the Board to decide representational disputes. See Section 2 Ninth (45 U.S.C. § 152 Ninth). While this is an exception to the general rule of the statute that the Board's role be non-adjudicatory, Section 2 Ninth also proves what should be presumed—that the Congress knows how to draft a provision conferring decisional authority upon an agency when it intends that the agency be clothed with that sort of power. Nor does the legislative history of the 1934 amendments reflect any purpose to alter the nonadjudicatory role of the Board respecting major disputes. See *S. Rep. No. 1065*, 73rd Cong., 2d Sess. (1934), p. 3 (the Board's "powers are wholly persuasive"); *H. Rep. No. 1944*, 73rd Cong., 2d Sess. (1934), p. 2 (the bill "does not change the methods [respecting] . . . major disputes").

Congress intended to give to the Mediation Board the authority to enforce the "duty" imposed by Section 2 First—much less that it also intended to withhold such authority from the courts. Section 5 directs the Board to exercise *its* "best efforts" to bring about a settlement, but does not speak in terms of the Board's compelling the parties to exercise *their* best efforts or deciding whether or not they have. And the Board is to terminate its services when it is satisfied that its efforts have been "unsuccessful," not when it determines that the parties' efforts have, or have not, complied with the Act.

As we read the Court of Appeals opinion, it does not rely upon statutory language, but rather upon what the Court regarded as important extrinsic considerations that revealed the purpose of Congress. We discuss those considerations later. But it is one thing to look beyond the terms of the statute for evidence of legislative intent and another to sweep those terms aside altogether. The fact is that the primary tool of legislative construction, the statute itself, weighs most heavily against the holding of the court below.

C. The Railway Labor Act of 1926—Its Legislative History.

What seems clear on the face of the statute is confirmed by the legislative history of the 1926 Act—the Congress did intend that Section 2 First be enforced by the courts, and it did not want the Mediation Board to undertake any such adjudicatory responsibility.

We need not discuss all the materials bearing on the general purpose of the Congress to depart from the basic scheme of the Transportation Act of 1920 under which public opinion afforded the sole sanction

for transgressions, since this Court has carefully examined those materials in other cases. The most notable occasion, perhaps, was *Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks,* 281 U.S. 548 (1930). The question there was whether Section 2 Third of the Act, which provided for the selection of employee representatives "without interference, influence, or coercion," "imposed a legal duty upon the Railroad Company, that is, an obligation enforceable by judicial proceedings." *Id.* at 560. In holding that the Act did impose such an obligation, this Court canvassed the legislative history of the statute, observed that the Congress regarded the 1920 Act as beset by "infirmity," and concluded:

> "It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite legal obligations enforceable by judicial proceedings." *Id.* at 567.

This shift from a statutory scheme marked by exclusive reliance upon public opinion to one marked in substantial measure by reliance upon judicially enforceable obligations is, of course, relevant here. As we have noted (*supra* p. 29), the dominant policy of the Transportation Act was enough for the Court in the second *Pennsylvania* case to hold non-enforceable language in Section 301, the forerunner of Section 2 First, that the Court said might otherwise have been held enforceable. But the abandonment by the Congress of that policy led the Court in *Texas & N.O.,* applying normal canons of statutory construction, to hold Section 2 Third enforceable. And surely Section

2 Third is framed in no more mandatory terms than Section 2 First.

But beyond that, while there evidently was no legislative history specifically addressed to the enforceability of Section 2 Third, there is compelling legislative history directed to the judicial enforceability of Section 2 First.

As this Court noted in *Texas & N.O.* (*id.* at 563-564), the Railway Labor Act was drafted by a committee representing most of the railroads and railroad unions and was supported by both management and labor. "It is accurate to say that the railroads and the railroad unions between them wrote the Railway Labor Act of 1926 and Congress formally enacted their agreement." *Railway Employes' Dep't* v. *Hanson,* 351 U.S. 225, 240 (1956) (concurring opinion), quoted in *International Ass'n of Machinists* v. *Street,* 367 U.S. 740, 758 (1961).

Donald R. Richberg, who was the principal spokesman for labor, discussed at some length the question whether parties could be held to account by the courts for violations of Section 2 First.[12] What he said came to this: First, Section 2 First imposes "a legal duty upon" the parties "to make every reasonable effort to make and maintain agreements," and "it would be possible to obtain judicial power to enforce" that obligation. Second, the drafters of the legislation had deliberately refrained from "writ[ing] into the law a specific line of penalties and writs of enforcement" be-

[12] This Court has regarded Mr. Richberg's testimony as authoritative. See *Detroit & T.S.L. R.R.* v. *United Transportation Union,* 396 U.S. 142, 152 n. 19, 153 n. 20 (1969); *International Ass'n of Machinists* v. *Street,* 367 U.S. 740, 758-59 (1961).

cause of their belief that it was preferable "for the law of such enforcement or compulsion [to] be developed in the courts, according to the old common law theory of letting the courts develop the law after the obligations are clearly understood." Third, if there were to be any restrictions upon enforcement of Section 2 First, those restrictions would have to arise from some inherent limitation upon the judicial power, since the Act contemplated judicial enforcement on a case-by-case basis in the same fashion that a court would enforce any other legal obligation similar to that imposed by Section 2 First. Mr. Richberg summarized his position as follows: ". . . [T]he legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate violation of that legal obligation could be prevented by court compulsion." [13]

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[13] In fuller text, Mr. Richberg's comments summarized above were as follows:

"Mr. Fredericks [a member of the House Committee]: Now does this law up to the time where the mediation board is provided for require the doing of anything which you could not do without it?

"Mr. Richberg. Require otherwise?

"Mr. Fredericks. Yes.

"Mr. Richberg. I think it does; in other words, *it requires both parties to make every reasonable effort to make and maintain agreements. It makes that a legal duty upon them.*

"Mr. Fredericks. How is that enforced?

"Mr. Richberg. Well, that is a different question.

"Mr. Fredericks. I know it is. I am asking you a different question.

"Mr. Richberg. Well, when you say to require—I do not want to say that it compels in the sense of putting a legal force on them. We have avoided in the bill in any way setting up any penalty sections or any sections for the invocation of any judicial authority, except in the enforcement of an arbitration award. *The thought being this, that so far as this*

Nor did it ever occur either to Mr. Richberg or to Mr. A. P. Thom, the principal railroad spokesman, that this "legal obligation" of Section 2 First, as Mr. Richberg characterized it, would be enforced in any respect by the Mediation Board. Quite to the contrary.

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law stated duties imposed upon the parties by act of Congress, if they failed to live up to their duties, and there was any action which a court could take consistent with the judicial powers and its limitations, to compel the enforcement of that duty as a legal obligation, it would be subject to enforcement. But the law for such enforcement or compulsion should be developed in the courts, according to the old common law theory of letting the courts develop the law after the obligations are clearly understood, rather than to write into the law a specific line of penalties and writs of enforcement.

"Now there are certain limitations upon what I have said, because how far the court, for example, can compel the parties to exert every reasonable effort, what that means, may be a question. But when the transportation act was under consideration by the Supreme Court the Supreme Court said that very clearly there was no purpose by Congress in passing that act to have the labor board's orders enforced by judicial order.

"What we have sought here is not to enforce the orders of any Governmental tribunal, but to provide a basis upon which it may be possible to enforce legal obligations written by Congress. Now that would present a different question in a judicial proceeding. For example, *it may well be that an effort on the part of any group of men of either party, representing either employer or employees, to set up barriers to the free operation of this law, would be in violation of the law, and it would be possible to obtain judicial power to enforce that.*" "Railroad Labor Disputes." *Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7180*, 69th Cong., 1st Sess. (1926), p. 40. (Emphasis supplied.)

Later in the hearings, Mr. Richberg reconfirmed his view in a colloquy with Congressman Garber:

"Mr. Richberg. In the first place, it is their duty to exert every reasonable effort—taking page 3—to settle all disputes, whether arising out of the abrogation of agreements or otherwise, in order to avoid any interruption to commerce. *In other words, the legal obligation is imposed, and as I have previously*

Just as the drafters of the legislation regarded the experience under the Transportation Act of 1920 as calling for the enactment of judicially enforceable duties, so too did they regard the unhappy experience of the Railroad Labor Board as arguing for a mediatory body that would not be called upon to express its own view as to controversies between the parties. We set

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stated, and I want to emphasize it, I believe that the deliberate violation of that legal obligation could be prevented by court compulsion.

• • • •

"We believe, and this law has been written on the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is more danger in attempting to write specific provisions and penalties into the law than there is in *writing the general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America. . . .*" *Id.* at 91. (Emphasis supplied.)

See also *id.* at pp. 84, 85.

Similarly, in the House debates Mr. Nelson said that Section 2 First "puts upon the railroads and the employees the legal obligation to exert themselves in every reasonable way to arrive at an agreement"; and Mr. Mapes said that the bill "declares the legal as well as the moral obligation of the parties to use every effort to settle all their disputes themselves in conference." 67 *Cong. Rec.* 4517, 4522 (1926). And, in a longer discussion, Mr. Newton said that the bill imposed "certain duties," including the obligation "[t]o make reasonable effort to settle disputes," which were not "merely directory" because:

". . . [T]he word 'shall' is used. Certain duties, both general and specific, are laid upon the parties . . . The violation by either party of these duties would call for appropriate action in the courts of law and equity by the aggrieved party or the public.

"Mr. Sproul of Kansas. In what way? Where is there any such provision?

"Mr. Newton of Minnesota. Through the theory of the common law. The duties are laid down. The law for enforcement would be developed in the courts after the obligations are made and understood." *Id.* at 4584.

forth in the margin the many statements by Messrs. Richberg and Thom that establish that, so far as the architects of the bill were concerned, the role of the Board in the mediation prescribed by the Act would be restricted to informal and confidential conciliation, and that this role would be undercut if the Board were to "make public reports . . . condemning one party or the other," or if it were to "render any decision" or "to make findings" or to be a "sort of super-labor board." As Mr. Thom summarized the matter, "The board of mediation has no right to make findings; they have only the function of conciliation and persuasion. . . ." [14] While the witnesses were directing their attention in the main to the way in which the confidence of the par-

[14] Messers. Richberg and Thom testified as follows in the House Hearings (see n. 13 *supra*) and in "Railway Labor Act," *Hearings before the Senate Committee on Interstate Commerce on S. 2306*, 69th Cong., 1st Sess. (1926):

". . . The board of mediation, to preserve its ability to mediate year after year between the parties, must not be given any duties to make public reports condemning one party or the other, even though the board may think one party is wrong. That is the fundamental cause of failure of the Labor Board. . . . The board of mediators should never make any reports to the public condemning one party or the other. Their duty is that of remaining persuaders. . . ." *House Hearings* at 18 (Richberg).

"Well, in all respects that I can see, they [mediation proceedings] should be regarded as private hearings. They are not private in this sense, that of course if mediation is called for in a situation that is of public interest, the public will know that the mediators are operating in the situation, but there will not be public hearings in the sense that the mediators will not sit behind the table and call witnesses and have the general public present to hear the presentation. In other words, they are trying to settle a controversy, not to make it worse." *House Hearings* at 89 (Richberg).

". . . The board of mediation attempts to bring them [the parties] to an agreement, first, as to the dispute itself, and if that fails, then an agreement to arbitrate. But the board of

ties in the impartiality of the Railroad Labor Board had been eroded by the Board's taking positions on the merits of the disputes, it is scarcely arguable that the same danger of impairment of the conciliation function

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mediation does not render any decision." *House Hearings* at 131 (Thom).

"The board of mediation has no right to make findings: they have only the function of conciliation and persuasion. . . ." *House Hearings* at 136 (Thom).

". . . It is to be assumed, I assume, that the board of mediation will act as the old board of mediation used to act, by interviewing the parties, by attempting through conciliatory methods and persuasion to induce them to agree, and failing that effort, to bring about arbitration. But that board is not intended to make any statement to the public, if that is what you mean." *Senate Hearings* at 11 (Thom).

"Now the board of mediation is intended to continue to be regarded by both parties as an impartial body whose services will be valuable, and bring them together. . . . So the power was scrupulously withheld from this mediation board to do anything but try to bring the parties together. They must continue with their powers of conciliation unimpaired, and they could not do that if they are to render judgment. So that there never was a purpose to make the board of conciliation a fact-finding commission or to have a report on the merits." *Senate Hearings* at 13 (Thom).

". . . Now you are going to destroy that [mediation] function if you set that board up in this law in such a manner that you appear to be creating another Labor Board, a sort of super-labor board that will come in and solemnly sit behind a table and summon witnesses and take evidence and consider the matter in private conference, and then issue an unenforceable opinion. Now that is not going to help the situation very much, as has been demonstrated by the Labor Board. When you require men to testify in public you know the care with which they must weigh their words, you know how difficult it is quickly to arrive at all the underlying factors in the controversy. But when men are brought into private conference, when a dispute is investigated informally and the men on both sides can be talked to freely and frankly, that is the reason why Government mediation has been successful in the past, and that is the reason why Government mediation should be successful under this bill and never call for the

would not arise from agency determinations that one or another of the parties had not bargained in good faith.

This legislative history respecting the enforceability of Section 2 First and the role of the Mediation Board is clear and persuasive.[15] Together with the statutory

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creation of an emergency board." *Senate Hearings* at 83-84 (Richberg).

"... This mediation board does not decide anything except in a single case. It is only intended to exert its good offices to bring the parties together .... The mediation board does not [decide anything], except in the single case mentioned [in what is now 45 U.S.C. § 155 Second], where they give an interpretation of an existing agreement after hearing. ..." *Senate Hearings* at 157 (Thom).

For similar remarks in the debates, see 67 *Cong. Rec.* 4517, 4573, 4657, 4703, 4779, 8894, 9200 (1926).

[15] Note may also be taken of Mr. Richberg's testimony respecting the Howell-Barkley bill, drafted and sponsored by the unions and considered in 1924 by the 68th Congress. See "Arbitration between Carriers and Employees," *Hearings before the Senate Committee on Interstate Commerce on S. 2646,* 68th Cong., 1st Sess. (1924), p. 15. That bill contained many of the provisions that were to appear in the Railway Labor Act, including Sections 2 First and 5 First. 65 *Cong. Rec.* 7881-82 (1924). As to Section 2 First, Mr. Richberg testified that the duty "to exert every reasonable effort to make and maintain agreements" would be "the foundation principle of the railway labor act," and that that provision would establish "mutual obligations of employer and employee *which are to be enforced by law*" (emphasis added). He added that the "legal propriety of imposing this duty upon" the parties "can hardly be questioned in view of the decisions of the Supreme Court sustaining regulations of industrial relations in many cases ...." As for the mediation board, he explained that the new provisions would eliminate "the difficulty" of the old Labor Board, and he paraphrased a statement by Secretary of Commerce Hoover that "there is a fundamental inconsistency in attempting to combine the functions of a mediator and an arbitrator in the same board." *Senate Hearings,* pp. 17-18, 24. Moreover, the sponsor of the bill, Congressman Barkley, explained on the floor of the House that the "Board of Mediation is not a deciding body" and that "it cannot decide anything." 65 *Cong. Rec.* 7780 (1924).

language itself, it stands squarely in the way of t
holding of the court below.

**D. The Railway Labor Act of 1926—The Role of Section 2 Fi
in the Statutory Scheme.**

Another relevant consideration in a case of this so
as this Court said in *Texas & N.O.* (281 U.S.
568), may be "the importance of the prohibition in
relation to the plan devised by the Act." In view
the clarity of both the terms and the legislative histo
of Section 2 First, only the clearest demonstration th
judicial enforcement would badly cripple the "pl
devised by the Act" could even arguably support t
conclusion that enforcement by the courts should
denied. But the fact is, as we now show, that it is t
rule of the decision below, not judicial enforceme
that would undermine the policy of the Act.

As this Court noted in *Texas & N.O.,* (281 U.S.
565), "the major purpose of Congress in passing t
Railway Labor Act was 'to provide a machinery to p
vent strikes.'" That machinery consists of "rath
elaborate . . . [provisions] for negotiation, mediati
voluntary arbitration, and conciliation." *Detroit
T.S.L. R.R.* v. *United Transportation Union,* 396 U.
142, 148-149 (1969). "[T]he procedures of the Act a
purposely long and drawn out, based on the hope th
reason and practical considerations will provide
time an agreement that resolves the dispute." *Broth
hood of Ry. Clerks* v. *Florida E.C. R.R.,* 384 U.S. 2
246 (1966).

Among these various provisions designed to avo
strikes by the encouragement of reasoned bargainin
Section 2 First, as this Court has declared, is central

> "The heart of the Railway Labor Act is the du
> imposed by § 2 First upon management and labo

'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.'" *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377-378 (1969) (elipses by the Court).

It is evident why that is so. Section 6 of the Act requires the parties to hold conferences, but it doesn't in terms impose anything but a purely procedural obligation. So, too, with respect to Section 5, which authorizes either of the parties to invoke mediation and the National Mediation Board to proffer its services if there is no invocation. So, too, with respect to Section 10, which authorizes the establishment of emergency boards. So, too, with respect to the obligations of the parties during the "cooling off" periods prescribed by Sections 6, 5, and 10 during conferences and mediation as well as after the Mediation Board and the Emergency Board have completed their work.

It is only Section 2 First that plainly states the legislative intent that, during the exhaustion of the various procedural steps required by the Act, the parties may not refuse to engage in meaningful negotiations. Accordingly, if the obligation of Section 2 First is not discharged during the course of the negotiations and mediation required by the Act, in the most fundamental sense there has not been the sort of negotiation or mediation contemplated by the Congress. Rather, there has just been the marking of time until, by the calendar, the union is free to strike or the railroad either to lock out or put its proposals into effect. As this Court said in one of its landmark decisions interpreting the Act, *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S.

711, 721-22 n.12 (1945), the "duty upon all parties t a dispute to negotiate for its settlement" "is not merel perfunctory." "Good faith exhaustion of the possi bility of agreement is required to fulfill it." And a a lower court said in connection with its order restrain ing a strike on grounds of alleged Section 2 First vio lations, "[t]o effectuate the purpose of the Act and t prevent a mockery of its requirements such efforts [t resolve the dispute] must be reasonable and made i good faith and not simply to satisfy perfunctory com pliance." *Long Island R.R.* v. *Brotherhood of R.R Trainmen,* 185 F. Supp. 356, 358 (E.D. N.Y. 1960) Or as that court said again in similar circumstance "[i]f compliance with the Act need only be perfunctor the congressional mandate would be defeated and th purposes of the Act rendered nugatory." *Pan Ameri can World Airways, Inc.* v. *Brotherhood of Ry. Clerks* 185 F. Supp. 350, 353 (E.D. N.Y. 1960).

These, then, are the basic policy considerations tha confirm what is evident from the language and histor of the statute—the Congress intended that Section First be enforced because the obligation it imposes i as the lower court in the case at bar acknowledged, "a integral part in facilitating the other more specifi procedures of the Railway [Labor] Act" (App. 233).

As to the question in this case—whether the enforc ing agency should be the National Mediation Board t the exclusion of the courts—one crucial factor in addi tion to those we have discussed in previous portions o this brief stands out. The jurisdiction of the Mediatio Board extends to only one of the several procedura stages required by the Act, while the obligation of Sec tion 2 First applies throughout a dispute. Thus, th Board cannot compel good faith bargaining during th

conferences prescribed by Section 6, and yet it was the purpose of the Congress that, whenever possible, disputes be settled at that stage without intervention by third parties.[16] If a judicial remedy is not available, the "duty" of the parties to exert every reasonable effort to settle during conferences will simply be read out of the Act. Even more significantly, once the Mediation Board surrenders its jurisdiction under Section 5 of the Act, it no longer has the power to require the parties to maintain the *status quo,* and accordingly it no longer has any power to induce compliance with Section 2 First. That is so during the 30-day "cooling off" period that under Section 5 follows the termination of mediation; during the 30 days allotted to emergency board hearings by Section 10 in those disputes that "threaten . . . to deprive any section of the country of essential transportation service"; during the second 30-day "cooling off" period required by that Section after an emergency board report; and of course thereafter as well. And yet, in the most important and intractable disputes, in those that most seriously jeopardize the interest of the public in averting a shut-

[16] Thus, Section 2 Second (45 U.S.C. § 152 Second) provides:

"All disputes . . . shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

And see, *e.g.,* the statement of Congressman Mapes, one of the spokesmen for the House bill, in the floor debate:

"In other words, the bill recognizes and declares the legal as well as the moral obligation of the parties to use every effort to settle all their disputes themselves in conference, amicably and without calling in any outside help. That is the spirit in which the entire bill is written. That thought can not be overemphasized." 67 *Cong. Rec.* 4522 (1926).

down of rail service, it is precisely during these terminal periods that the necessity of compliance with Section 2 First is most pressing.

But not only would delegation of the power to enforce Section 2 First to the Mediation Board rather than to the courts fail to secure the goal of the legislation. It would also in many instances defeat that goal in a way different from, and in addition to, the compromising of the Board's mediatory effectiveness that we have already discussed in connection with the legislative history of the Act. This additional subversion of the legislative policy would occur because the only remedy available to the Board would be to take action that often would promote, rather than prevent, strikes.

The Court of Appeals suggested that the Mediation Board could deal with violations of Section 2 First this way:

> "The Board [under Section 5] can refuse to certify that 'its mediatory efforts have failed' and thus prevent the exercise of self-help until it is satisfied that its mediatory efforts had a chance to fail, *i.e.*, that the parties were bargaining in good faith. . . .
>
> . . . . . .
>
> "Of course, if one party is not negotiating in good faith as a dilatory tactic to prevent the other party from eventually exercising self-help, the Board can decide to release jurisdiction of the dispute and allow the procedures of the Act to be exhausted in order to allow for self-help." (App. 225 & n. 12.)

The inadequacy of these "remedies" in terms of the aim of the statute—the prevention of strikes through good faith bargaining—is apparent. It is well and

good to suggest that, where the union is both the proponent of a change in the existing agreements and is also the party not bargaining in good faith, the Board could promote bargaining and prevent a strike simply by refusing to release its jurisdiction over the dispute. But those plainly would not be the results, as the second paragraph of the Court of Appeals opinion quoted above discloses, where the party that does not bargain in good faith is the resisting party rather than the moving party. Thus, where the union proposes and the carrier refuses to dispose, the notion is that the union should be freed to strike rather than that the carrier should be compelled by injunction to bargain; and where the carrier proposes and the union refuses to dispose, the notion is that the carrier should be authorized to put into effect its proposals or lock out, action that in any important dispute is virtually certain to provoke a retaliatory strike. The purpose of the Act is to insure honest negotiations, not economic warfare. Giving a party the "remedy" of engaging in such warfare is hostile to, not supportive of, the fundamental statutory scheme.

II. DECISIONS BY THIS COURT, AS WELL AS BY THE LOWER FEDERAL COURTS, ESTABLISH THAT SECTION 2 FIRST IS JUDICIALLY ENFORCEABLE.

We turn now to the case law that bears on the question of the judicial enforceability of Section 2 First. That authority is decisively against the holding of the Court of Appeals in the case at bar. Most of the cases we will discuss deal directly with the Railway Labor Act. In addition, however, we take note of this Court's enforcement of Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108), which is written in precisely the same terms as Section 2 First.

A. Decisions of This Court.

1. *The Virginian Ry. case.* The line of Section 2 First cases begins with the decision that, as we have indicated, we regard as controlling, *Virginian Ry.* v. *System Federation,* 300 U.S. 515 (1937). That decision, which is surely one of the most important of this Court's Railway Labor Act decisions, has been heavily relied upon by the lower courts, as we will show.

In *Virginian,* the plaintiff union, which had won a representation election conducted under Section 2 Ninth of the Act (45 U.S.C. § 152 Ninth), sought judicial intercession when the carrier continued to deal with a "company union." The union grounded its claim upon several provisions of the Railway Labor Act, including Section 2 Ninth and Section 2 First. The District Court held for the union, entering an injunction that directed the carrier both to "treat with" the union, in the language of Section 2 Ninth, and "to exert every reasonable effort to make and maintain agreements" with the union, in the language of Section 2 First. *Id.* at 540.

In this Court, the carrier attacked both parts of the injunction on the theory that the statutory provisions upon which they were based were intended by the Congress to be merely precatory. The principal authority advanced in support of this argument was *Pennsylvania R.R. System Federation* v. *Pennsylvania R.R.,* 267 U.S. 203 (1925). 300 U.S. at 544. There, as we have noted (*supra* p. 29), this Court held that the forerunner of Section 2 First—Section 301 of the Transportation Act of 1920—was "without legal sanction in that Act." Beyond that, the carrier urged that the subject matter of the injunction, which involved

evaluation of the carrier's good faith, was not suitable for judicial inquiry. *Id.* at 549.

In countering these arguments, the union had the support of the United States, which appeared as *amicus curiae.* The Solicitor General, advancing considerations we urge in the case at bar, argued:

> "A review of the history and context of these sections . . . shows that Congress intended the obligations imposed by paragraphs First, Second, and Ninth of § 2, to be both mandatory and enforceable.
>
> "Enforcement of paragraphs First, Second, and Ninth of § 2 is in fact essential to the success of the statutory plan for amicable settlement of disputes through conferences between representatives of the parties. . . ." 300 U.S. at 536.

This Court agreed. This is how the Court summarized the carrier's principal argument against the enforceability of the Act's commands:

> "But petitioner insists that the statute affords no legal sanction for so much of the decree as directs petitioner to 'treat with' respondent Federation 'and exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise.'" 300 U.S. at 544.

And this is how the Court rejected that argument:

> "The policy of the Transportation Act [of 1920] of encouraging voluntary adjustment of labor disputes, made manifest by those provisions of the Act which clearly contemplated the moral force of public opinion as affording its ultimate sanction, was . . . abandoned by the enactment of the Rail-

way Labor Act. Neither the purposes of the later Act, as amended, nor its provisions when read, as they must be, in the light of our decision in the *Railway Clerks* case [*Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks,* 281 U.S. 548 (1930)] . . . lend support to the contention that its enactments, which are mandatory in form and capable of enforcement by judicial process, were intended to be without legal sanction.

. . . . . .

"The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First." *Id.* at 545, 548 (footnote omitted).

As to the carrier's secondary argument respecting the propriety of judicial relief, the Court summarized the carrier's position in this way:

"Petitioner contends that . . . negotiation depends on desires and mental attitudes which are beyond judicial control, and that since equity cannot compel the parties to agree, it will not compel them to take the preliminary steps which may result in agreement." *Id.* at 549-550.

And this is how the Court disposed of that contention:

"Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees." *Id.* at 550.

In the case at bar, the Court of Appeals thought that *Virginian* meant only that the parties in negotiating "should be guided by" Section 2 First, not that a refusal to comply with that provision could be remedied by judicial decree. That is so, the court below said, because this Court in *Virginian* "did not state nor imply that whether reasonable effort is in fact complied with by either party was a question for the courts to answer" (App. 228).

In this the Court of Appeals erred. This Court in *Virginian* not merely "implied," but explicitly "stated," that compliance by the carrier with its Section 2 First obligation was "a question for the courts to answer." It so "stated" when it wrote that the Act "required the employer . . . to make reasonable effort to compose differences" and "to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First," and when it wrote that "whether action taken or omitted is in good faith or reasonable . . . [is an] everyday subject . . . of inquiry by courts in framing and enforcing their decrees." And just as surely this Court "implied" the same thing when it rejected the argument that Section 2 First "affords no legal sanction" for so much of the injunction as required the carrier to "exert every reasonable effort" to settle its disputes with the union.

Under the Court of Appeals approach to Section 2 First, the only avenue open to the union in *Virginian* would have been to serve Section 6 notices, to invoke the services of the Mediation Board, and then to secure release of the case by the Board so as to permit a strike against the railroad. The endorsement of this course as the only "remedy" available under the Act would have required the adoption of a view of the

whole statutory scheme, as well as of Section 2 First, directly at odds with *Virginian*.

2. *Opinions subsequent to Virginian.* Even if *Virginian* were in any way ambiguous with respect to the Section 2 First question, that ambiguity would be erased by this Court's description of *Virginian* in another of its leading Railway Labor Act opinions, *Elgin, J.&E. R.R.* v. *Burley*, 325 U.S. 711, 721-722 n. 12 (1945), *adhered to on rehearing*, 327 U.S. 661 (1946). There, citing *Virginian* as authority for the proposition that Section 2 First is "judicially enforceable" and that it requires "[g]ood faith exhaustion of the possibility of agreement," this Court stated:

> "Thus, one of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all parties to a dispute to negotiate for its settlement. See note 26 [quoting Section 2 First and other of the subsections of Section 2]; *Virginian R. Co.* v. *System Federation*, 300 U.S. 515; cf. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 300, 320; *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 331, 334. This duty is not merely perfunctory. Good faith exhaustion of the possibility of agreement is required to fulfill it. Cf. *Virginian R. Co.* v. *System Federation, supra*, at 548, 550; *Trainmen* v. *Toledo, P. & W.R. Co.*, 321 U.S. 50, 56 ff. . . ." [17]

All other references in this Court's opinions to *Virginian* and Section 2 First—and they are many—are in accord with *Burley*. Two terms ago, as we have al-

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[17] And again, on rehearing, the Court in *Burley* said: "We also pointed out that the Act imposes correlative affirmative duties upon the carrier, the collective agent and the aggrieved employee to make every reasonable effort to settle the dispute." 327 U.S. at 665 (footnote omitted).

ready noted (*supra* pp. 26, 42), this Court called Section 2 First the "heart of the Railway Labor Act." *Brotherhood of R. R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377-378 (1969). And just last Term, citing that opinion as well as *Burley* and *Texas & N.O.*, this Court declared that the Act "imposed upon the parties *an obligation to make every reasonable effort to negotiate a settlement* and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted," and also that Sections 5, 6, and 10 "must be read in conjunction with the implicit status quo requirement in *the obligation imposed upon both parties by § 2 First, 'to exert every reasonable effort' to settle disputes* without interruption to interstate commerce." *Detroit & T.S.L. R.R.* v. *United Transportation Union*, 396 U.S. 142, 149, 151 (1969) (emphasis supplied; footnotes omitted).

To move back in time, in *Brotherhood of Ry. Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 658 (1965), this Court reaffirmed *Virginian's* declaration that the Act requires "a negotiation for the settlement of labor disputes such as is contemplated by § 2, First"; in *Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330, 339 (1960), this Court referred to the "Act's command that employees as well as railroads exert every reasonable effort to settle all disputes"; in *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 758 (1961), this Court stated that Section 2 First "created affirmative legal duties on the part of the carriers and their employees"; and in *Stark* v. *Wickard*, 321 U.S. 288, 303 (1944), this Court cited *Virginian* as dealing with "a right created by statute [which] is mandatory in character and obviously capable of judicial enforcement."

See also *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192, 207 (1944); *Switchmen's Union* v. *NMB*, 320 U.S. 297, 300-301 (1943); *Tunstall* v. *Brotherhood of Locomotive Fire. & Eng.*, 323 U.S. 210, 213-14 (1944).[18]

3. *Other relevant Railway Labor Act decisions.* Three decisions of this Court dealing with provisions of the Act other than Section 2 First are also relevant. In each, this Court held the provision in question judicially enforceable upon reasoning pertinent to the issue at bar. The first is the 1930 decision in *Texas & N.O.*, 281 U.S. 548, which we have already mentioned. There, this Court held Section 2 Third enforceable by injunction. After reviewing the importance of the provision

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[18] For commentators' views of *Virginian* and Section 2 First, see Meltzer, "The Chicago & North Western Case: Judicial Workmanship and Collective Bargaining," 1960 *Supreme Court Review* 113, 125-126 & note 54 (In *Virginian* "the Court sanctioned the use of an injunction against an unwilling employer to enforce the duty to bargain." The "Court's statement that the Act requires the employer to make 'reasonable effort to compose differences' " is not *dictum*, because "the injunction sustained in *Virginian Railway* required the employer not merely to recognize the union but also to 'exert every reasonable effort to make and maintain agreements.' "); Note, 59 *Mich. L. Rev.* 459, 463 n. 27 (1961) (Section 2 First "is enforceable by order of a federal court," citing *Virginian*); Cox, "The Duty to Bargain in Good Faith," 71 *Harv. L. Rev.* 1401, 1404 (1958) (Section 2 First "is enforceable by a private suit for an injunction," citing *Virginian*); Harper, "Major Disputes Under the Railway Labor Act," 35 *J. Air. Law & Com.* 3, 35 (1969) (The Section 2 First duty "is judicially enforceable"; "failure to bargain in good faith is failure to comply with the Act and is enjoinable."); Highsaw, "The Need for Re-evaluation of Labor Legislation," "Symposium on Air Transport Labor Relations," 35 *J. Air L. & C.* 313, 450, 455 (1969) (Section 2 First "creates an enforceable obligation in the federal courts . . . . It is in essence a requirement of 'good faith' bargaining by the parties."). See also Smith, "The Evolution of the 'Duty to Bargain' Concept in American Law," 39 *Mich. L. Rev.* 1065, 1099-1100 (1941).

in the statutory scheme, the Court concluded that the Congress could not have "intended it to be ignored."

> "As the prohibition [of Section 2 Third] was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." *Id.* at 569.

Nor did the absence of a statutorily prescribed penalty detract from this conclusion. Observing that "a legal obligation is created" by other sections of the Act respecting obedience to arbitration awards and maintenance of the *status quo,* even though no penalties were specified in the statute, the Court cited *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 162, 163, (1803), for the principle that "[t]he right is created and the remedy exists." *Id.* at 569-70.

In *Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R.R.,* 353 U.S. 30 (1957), this Court held enforceable the requirement of Section 3 respecting arbitration of minor disputes. Moreover, the enforcement approved was by the same means the C&NW sought in the case at bar, that is, by an injunction against a strike on the ground that the statutory command had not been obeyed. While Section 3 contained no provision for enforcement, this Court sanctioned "the use of injunctive relief to vindicate the processes of the Railway Labor Act," citing *Virginian. Id.* at 41. The Court said in a later case, *Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.,* 362 U.S. 330, 339 (1960), that the strike injunction was warranted in *Chicago River* "to prevent a plain violation of a basic command of the Railway Labor Act . . . ." And in *Brotherhood of Locomotive Eng'rs* v. *Missouri-K.-T. R.R.,* 363 U.S. 528, 531 (1960), the Court further explained the hold-

ing in *Chicago River* by saying that the legislative purpose of Section 3 "might be frustrated if strikes could not be enjoined during the" statutory procedures.

Finally, in *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963), the Court found judicially enforceable Section 204 of the Act (45 U.S.C. § 184) imposing a duty upon parties to airline disputes to establish boards for compulsory arbitration of minor disputes. Section 204 contains no enforcement provision, but it is drawn in the same mandatory language as Section 2 First:

> "*It shall be the duty* of every carrier and of its employees. . . to establish a board of adjustment of jurisdiction [comparable to those authorized by] section 153 of this title." (Emphasis added.)

The Court concluded that Congress "intended [this] statutory command to be legally enforceable in the courts" in order to make the "system for the settlement of grievances" "reliable and effective," and to avoid the "confusion and chaos" which might result from leaving "the establishment of the Boards to the whim of the parties." 372 U.S. at 690.

In each of these cases, then, the Court held judicially enforceable provisions of the Railway Labor Act that, like Section 2 First, had been drafted by Congress in mandatory terms and were important enough to require judicial enforcement for the effective working of the statute. There is no basis for a different approach to the issue at bar. The Congress surely did not intend compliance with Section 2 First—the "heart" of the Act—to be left "to the whim of the parties." 372 U.S. at 690.

4. *The Missouri-K.-T. case.* While the Court of Appeals thought distinguishable the decision that is plainly in point, *Virginian,* it thought pertinent a decision that is plainly distinguishable, *General Committee* v. *Missouri-K.-T. R.R.,* 320 U.S. 323 (1943). That case involved a representational dispute between two unions in which one of them sued to prevent the carrier from dealing with the other with respect to certain issues, claiming that it was the sole representative authorized to negotiate about those issues. The plaintiff union relied on paragraphs First, Second, Fourth, and Ninth of Section 2 of the Act. In holding that the claim was not justiciable, this Court devoted most of its opinion to provisions other than Section 2 First. Its only mention of this provision appears in the following sentence, which the lower court in the case at bar cited: "But § 2, Second, like § 2, First, merely states the policy which those other provisions buttress with more particularized commands" (footnote omitted). 320 U.S. at 334.

But by this the Court meant only that the justiciability of the plaintiff's claim arising from a jurisdictional dispute was to be tested by reference to the statutory provisions specifically relating to such disputes, Section 2 Ninth (45 U.S.C. § 152 Ninth), rather than by reference to Section 2 First. The basis for the Court's holding was its conclusion that the Congress, by enacting Section 2 Ninth and thereby authorizing the National Mediation Board "to resolve a wide range of jurisdictional disputes between unions," evidenced an intent "not to leave their solution to the courts." 320 U.S. at 336. This was so even assuming that some types of jurisdictional disputes would not be within the Board's Section 2 Ninth jurisdiction, because "it

is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others." *Id.* at 336-37. The legislative purpose reflected in the "more particularized commands" of Section 2 Ninth could not be circumvented by reliance upon the more general provisions of Section 2 First and 2 Second. Or, as the Court put it with respect to the latter provision, "Nor does § 2, Second make justiciable what otherwise is not." *Id.* at 334. But this does not mean that claims under Section 2 First which do *not* involve representational or jurisdictional disputes are not justiciable. *Virginian* held that they are; for there, as we have indicated, this Court affirmed an injunction commanding obedience to Section 2 First after the plaintiff union's representational dispute had been resolved by the National Mediation Board under Section 2 Ninth. That holding was not diluted by *Missouri-K.-T.*[19]

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[19] That this is the correct interpretation of *Missouri-K.-T.* is also clear from the passage in *Burley* we have already quoted (*supra* p. 52). There, the Court reaffirmed that *Virginian* established that Section 2 First imposes obligations that are "judicially enforceable," and in that connection simply cited *Missouri-K.-T.* with a "*cf.*" signal. Moreover, in other opinions this Court has explained *Missouri-K.-T.* as a case in which the Act did not depend upon judicial enforcement of a statutory command in view of prescribed administrative remedies, in contrast to *Virginian* where there was "no mode of enforcement other than resort to the courts." *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192, 207 (1944); see also *Switchmen's Union* v. *NMB*, 320 U.S. 297, 300 (1943) ("If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control," citing *Virginian*); *Tunstall* v. *Brotherhood of Locomotive Fire. & Eng.*, 323 U.S. 210, 213-214 (1944); *Stark* v. *Wickard*, 321 U.S. 288, 303 n. 17 (1944).

5. *The Toledo, P. & W. R.R. case—enforcement of Section 8 of the Norris-LaGuardia Act.* There is one decision of this Court outside the area of Railway Labor Act case law that is relevant. It has to do with Section 8 of the Norris-LaGuardia Act (28 U.S.C. § 108), which is written in terms identical to Section 2 First. Section 8 also obliges parties to a labor dispute to "make every reasonable effort to settle." Accordingly, if enforcement of a standard of behavior framed in those terms were somehow alien to the judicial power—or so difficult as to give rise to a presumption of non-enforceability—Section 8 would be as much beyond the reach of that power—or as subject to such a presumption—as Section 2 First.

But in *Brotherhood of R.R. Trainmen* v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944), this Court enforced that provision against a railroad without suggesting that it was even remotely troubled about the prospect that courts would be called upon to decide on a case-by-case basis what facts do, and what do not, constitute a "reasonable effort" by the parties to a labor dispute. Following the lead of *Toledo,* courts have repeatedly decided whether railroads have violated Section 8.[20] Indeed, in the case at bar one of the defenses asserted

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[20] See, *e.g.*, *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581, 613-14 (D.C. Cir. 1967); *Butte, A. & P. Ry.* v. *Brotherhood of Locomotive Fire. & Eng.*, 268 F.2d 54, 60 (9th Cir. 1959); *Order of Ry. Conductors* v. *Spokane, P. & S. Ry.*, 366 F.2d 99, 105 (9th Cir. 1966); *Rutland Ry.* v. *Brotherhood of Locomotive Eng'rs*, 307 F.2d 21, 39 (2d Cir. 1962); *Brotherhood of R.R. Carmen* v. *Chicago & N.W. Ry.*, 354 F.2d 786, 794 (8th Cir. 1965); *Illinois Central R.R.* v. *Brotherhood of R.R. Trainmen*, 398 F.2d 973, 975 (7th Cir. 1968); *Long Island R.R.* v. *System Federation*, 368 F.2d 50, 53 (2d Cir. 1966); *Switchmen's Union* v. *Southern Pac. Co.*, 398 F.2d 443, 447 (9th Cir. 1968); *Brotherhood of Ry. Clerks* v. *Florida E.C. R.R.*, 384 U.S. 238, 247 & n. 8 (1966).

by the union was that the C&NW had failed to comply with Section 8. See *supra* p. 8 n. 6.

To be sure, the question whether the Congress intended these statutes to be judicially enforceable must be tested by reference to the separate legislative history and function of each of the two provisions, Section 2 First and Section 8. It is conceivable—though we suggest most unlikely—that the Congress meant to place the railroads under judicial constraint by Section 8, but not the unions by Section 2 First. However, *Toledo* establishes at a minimum that the character of the judicial task in applying the "reasonable efforts" standard is no basis for arguing that Section 2 First is not judicially enforceable.[21]

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[21] Good faith bargaining provisions are also included in the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, and are enforceable. Thus, Sections 8(a)(5), 8(b)(3), and 8(d) (29 U.S.C. §§ 158(a)(5), (b)(3), and (d)) make it an "unfair labor practice" for an employer or a union to fail to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." The National Labor Relations Board is entrusted with the primary responsibility of adjudicating questions of compliance with these provisions, but the power of enforcement and review of the NLRB's orders lies in the courts. See Section 10 of the Act (29 U.S.C. § 160). Accordingly, the courts have established a large body of case law respecting the good faith bargaining obligation. See, *e.g.*, NLRB v. *American National Insurance Co.*, 343 U.S. 395, 409 (1952); *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956); *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 487 (1960); *NLRB* v. *Katz*, 369 U.S. 736, 747 (1962). Note may also be taken of Sections 204(a)(1) and 209(a) of the Act (29 U.S.C. §§ 174(a)(1), 179(a)), which are phrased in terms similar to Section 2 First. The former provision illumines the good faith bargaining requirement that is enforced by the NLRB, see *NLRB* v. *Truitt Mfg. Co.*, *supra*, at 152; and the latter, which applies during the national emergency strike injunction period provided for in Section 208 of the Act (29 U.S.C. § 178), is enforceable by the courts. *United States* v. *International Longshoremen's Ass'n*, 116 F.Supp. 262, 266-67 (S.D.N.Y. 1953).

B. Decisions of Lower Federal Courts.

In the lower federal courts, a large body of case law has developed in the wake of *Virginian* affirming the judicial enforceability of Section 2 First both in strike injunction suits and in other contexts. Outside the Seventh Circuit, "the courts have enjoined . . . threatened and impending strikes in major disputes where good faith bargaining has not taken place in the manner and to the extent required by the act. . . ." *Southern Ry.* v. *Brotherhood of Locomotive Fire. & Eng.*, 223 F. Supp. 296, 305 (M.D. Ga. 1962), *aff'd on basis of opinion below*, 324 F.2d 503 (5th Cir. 1963). We examine those decisions in some detail because, though they come from lower courts rather than from this Court, taken together they are impressive evidence that there has long existed a settled view that Section 2 First imposes obligations upon the parties as to which judicial relief may be sought. The principal decisions are from the Courts of Appeals for the Second, the Fourth, the Fifth, and the District of Columbia Circuits.

1. *The Fourth Circuit.* We begin with the decision that the Court of Appeals in the case at bar acknowledged was in conflict with its own, *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n*, 416 F.2d 633 (1969), *cert. den.*, 397 U.S. 926 (1970). In *Piedmont*, as in the case at bar, the formal procedures of the Act had been exhausted, the Mediation Board having terminated its services; but the carrier sought a strike injunction on the ground that the union had violated Section 2 First. The District Court in *Piedmont* granted a preliminary injunction because "the union failed to negotiate in good faith as required by the . . . Act." 416 F.2d at 637. The Court of Appeals affirmed. With respect to

the enforceability of Section 2 First, the Court of Appeals explained:

> "Restraining the parties from self-help, through strikes or otherwise, until they have complied with the duty to bargain in good faith vindicates the congressional purpose of providing machinery to prevent strikes without creating an irreconcilable conflict with the Norris-LaGuardia Act. Restraint conditioned in this respect does not deny the right to strike over a major dispute; but it delays this right until the union satisfies the mandate of the Railway Labor Act." *Id.* at 636.

This ruling was in accord with previous decisions by that Court of Appeals. It was the Fourth Circuit's 1936 decision in *Virginian Ry.* that was affirmed by this Court. *Virginian Ry.* v. *System Federation,* 84 F.2d 641 (1936), *aff'd,* 300 U.S. 515 (1937). Later, in *Brotherhood of Ry. Clerks* v. *Atlantic C.L. R.R.,* 201 F.2d 36 (1953), the Court of Appeals directed the grant of injunctive relief to compel the carrier to bargain with the union after the National Mediation Board had released the case and all formal procedures of the Act had been exhausted. The Court cited Sections 2 First and 2 Ninth, together with this Court's decision in *Virginian,* and stated:

> "It was the duty of the railroad under this statute to bargain in good faith with the brotherhood .... An employer who assumes an intransigent attitude in refusing to bargain collectively manifestly does not meet the requirements of the statute merely because he listens politely to an offer and exercises politeness in declining it without making any counter offer or indicating any basis upon which he is willing to bargain." *Id.* at 39-40.

See also *Norfolk & P.B.L. R.R.* v. *Brotherhood of R.R. Trainmen,* 248 F.2d 34, 45 n. 6 (1957), where,

in upholding a carrier's right to a strike injunction, the court in *dictum* suggested that the union's bargaining might not have "satisf[ied] the substantive requirement of negotiation imposed upon the Brotherhoods by the Act" and stated that the "negotiation required by the Act is the same 'good faith' bargaining required by the Labor Management Relations Act . . . ."

2. *The District of Columbia Circuit.* In *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581 (1967)—discussed *supra* pp. 8-9 in connection with the background of this dispute—the District Court held that a union's Section 6 notices served prior to the expiration of the Award of Arbitration Board No. 282 were premature and that the conferences on those proposals did not satisfy the Act's requirements because the carriers had refused to discuss the merits of the proposals, as they had a right to do. Genuine conferences, the District Court decided, had to be held before the union could invoke the services of the Mediation Board:

> "Under the Railway Labor Act, as it has been construed by the Supreme Court in . . . [*Virginian*] . . . there is a binding obligation on the part of both parties to conduct negotiations in good faith pursuant to notices served under Section 6 of the Railway Labor Act. The Supreme Court made it clear that the provision for negotiations was not merely an expression of a pious wish, was not hortatory, but was a command.
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> . . . .
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> "There must be *bona fide* actual negotiation, and the courts will, by appropriate decrees, require negotiations." *Akron & B.B. R.R.* v. *Order of Ry. Conductors,* 253 F. Supp. 538, 539-40 (1966).

The Court of Appeals affirmed that determination, upholding a restraining order against a strike. 385

F.2d at 598, 614. Under the Seventh Circuit's view, that determination could not have been made; it would have been within the exclusive jurisdiction of the National Mediation Board, which had actually undertaken mediation with respect to a number of the notices in question. 385 F.2d at 597, 598.

Three other District of Columbia Court of Appeals decisions are in accord with *Akron*. Prior to that case, the Court of Appeals had affirmed a determination by the Railroad Retirement Board that a strike had "violated Section 2, First of the Railway Labor Act" and that therefore, the striking employees were not entitled to unemployment benefits. *Brotherhood of Ry. Clerks* v. *Railroad Retirement Bd.*, 239 F.2d 37, 43-44 (1956). At about the same time as *Akron*, the Court of Appeals refused to set aside pending appeal the portion of an injunction requiring a carrier to "exert every reasonable effort" to resolve its "major" dispute with a union, citing *Virginian* and stating: "The Supreme Court has held that a federal court may issue an injunction to compel compliance by the employer with the requirements of § 2 First." *Southern Ry.* v. *Brotherhood of Locomotive Fire. & Eng.*, 384 F.2d 323, 328 (1967). And finally, in a suit brought to enjoin a strike after exhaustion of all formal procedures of the Act—a suit that is also part of the historical background of this dispute (*supra* pp. 10, 11, 14)—the Court of Appeals, while reversing the District Court's determination that the union had violated Section 2 First by refusing to engage in multi-employer bargaining, laid down the rule that a court must decide "[w]hat constitutes good faith bargaining in the railroad industry . . . on an issue-by-issue evaluation" of the relevant

facts. *Brotherhood of R.R. Trainmen* v. *Atlantic C.L. R.R.*, 383 F.2d 225, 229 (1967).[22]

In two recent cases, moreover, the United States District Court for the District of Columbia, guided by the Court of Appeals opinion in *Atlantic Coast Line,* issued strike injunctions after exhaustion of the formal procedures of the Act upon the basis of holdings that the unions had violated their statutory obligations respecting multi-employer bargaining. *Chicago, B. & Q. R.R.* v. *Railway Employes' Dept.*, 301 F. Supp. 603 (1969); *International Ass'n of Machinists* v. *National Ry. Lab. Conference,* 310 F.Supp. 905 (1970). In the latter case, for example, the Court held that "[b]y initiating and negotiating the dispute on an obligatory national basis and then striking the carriers on an individual basis it seems clear that the unions have violated their [Section 2 First] duty to 'exert every reasonable effort to make . . . agreements . . . and settle disputes.' " (Elipses by the court.) 310 F. Supp. at 912.[23] In yet two more recent cases the District Court issued temporary re-

[22] In issuing the strike injunction, the District Court had discussed the content of the "good faith bargaining" rule and had cited *Virginian* for the principle that "a fulfillment of this obligation may be compelled by judicial decree." *Atlantic C. L. R.R.* v. *Brotherhood of R. R. Trainmen,* 262 F. Supp. 177, 184 (1967).

[23] The *Chicago, B. & Q. R.R.* case was settled while an appeal was pending, and the District Court's judgment was ultimately vacated as moot. As to the *Machinists* case, while one of the several union parties has appealed, presumably it will not urge that Section 2 First is not justiciable, since none of the unions so contended in the District Court. Quite to the contrary, they contended that the railroads, in announcing that they would respond to a "whipsaw strike" by exercising their right to lock out, were threatening "a clear violation of . . . Section 2 First of the Railway Labor Act." 310 F. Supp. at 909.

straining orders in nearly identical circumstances, that is, all the formal procedures of the Act had been exhausted, but the railroads contended that the unions in abandoning multi-employer bargaining had violated Section 2 First. *Burlington Northern, Inc.* v. *United Transportation Union*, Civil Action No. 2026-70 (Order of July 7, 1970); *Delaware & Hudson Ry* v. *United Transportation Union*, Civil Action No. 2717-70 (Order of September 14, 1970). Finally, it is not without interest that in another recent District of Columbia suit, which was ultimately dismissed as moot, the UTU itself sought an injunction against a threatened lockout by the railroads on the ground that the lockout would be "in total disregard of their obligations imposed by Section 2, First and Seventh," contending that the "keystone of the Railway Labor Act is the duty prescribed by Section 2, First" and that accordingly the railroads should be enjoined. *Congress of Ry. Unions* v. *National Ry. Lab. Conference*, Civil Action No. 358-70, "Memorandum of Points and Authorities of Plaintiffs in Support of Motion for Preliminary Injunction," pp. 2, 8 (Feb. 5, 1970).

3. *The Second Circuit.* The Court of Appeals for the Second Circuit has also held Section 2 First to be enforceable by injunction. Its most recent decision is *Seaboard World Airlines, Inc.* v. *Transport Workers*, 425 F.2d 1086 (1970). There the court held that a strike called to press bargaining demands in a "major" dispute in violation of a valid contractual moratorium on such demands would violate Section 2 First, and that accordingly a strike should be enjoined pending the District Court's determination of the validity of the contractual moratorium. Three earlier decisions by the

Court of Appeals are in accord.[24] In the first, the court, while rejecting a carrier's Section 2 First claim, did so on the merits rather than on jurisdictional grounds, *Pan American World Airways, Inc.* v. *Flight Eng'rs Int'l Ass'n*, 306 F.2d 840, 849 (1962); so too in the second, where the court rejected a *union's* Section 2 First claim respecting a carriers' strike insurance plan, *Kennedy* v. *Long Island R.R.*, 319 F.2d 366, 370-71 (1963);[25] and in the third, where a union had neither resorted to grievance procedures nor served a Section 6 notice, the court affirmed a strike injunction because the union's conduct "was a flagrant violation under the Act of the 'duty of all carriers, [and] their . . . employees to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes. . . .'" *Long Island R.R.* v. *System Federation*, 368 F.2d 50, 53 (1966) (elipses by the court).

The district courts in the Second Circuit, moreover, have granted either temporary restraining orders or preliminary injunctions against strikes on Section 2 First grounds after exhaustion of the Act's formal procedures in the following cases: *Pan American World Airways, Inc.* v. *Brotherhood of Ry. Clerks*, 185 F. Supp. 350 (E.D. N.Y. 1960); *Long Island R.R.* v. *Brotherhood of R.R. Trainmen*, 185 F. Supp. 356 (E.D. N.Y. 1960); *Chicago, R.I. & P. R.R.* v. *Switchmen's Union*, 187 F. Supp. 581 (W.D. N.Y. 1960), *rev'd on other grounds*, 292 F.2d 61 (2d Cir. 1961); *Pan*

[24] The earliest opinion of the Court of Appeals on the subject took note of but did not decide the question whether a strike could be enjoined on grounds of a violation of Section 2 First. *Chicago, R.I. & P. R.R.* v. *Switchmen's Union*, 292 F.2d 61, 67 (1961).

[25] The union advancing the Section 2 First claim in that case was the Brotherhood of Railroad Trainmen, one of the unions which merged into respondent UTU. See *supra* p. 6 n. 2.

American World Airways, Inc. v. *Flight Eng'rs Int'l Ass'n* (unreported) (E.D. N.Y. 1961), *rev'd on other grounds,* 306 F.2d 840 (2d Cir. 1962). See also *American Airlines, Inc.* v. *Air Line Pilots Ass'n,* 169 F. Supp. 777, 787-790, 793, 798 (S.D. N.Y. 1958) (*dictum*); *Kennedy* v. *Long Island R.R.,* 211 F. Supp. 478, 486-488 (S.D. N.Y. 1962), *aff'd,* 319 F.2d 366, 370 (2d Cir. 1963) (*dictum*); *Long Island R.R.* v. *International Bro. of Teamsters,* 57 CCH Lab. Cas. ¶ 12,378 (E.D. N.Y. 1967); *KLM Royal Dutch Airlines* v. *Transport Workers,* 49 CCH Lab. Cas. ¶ 18,990 (E.D. N.Y. 1964) at p. 31,496. In granting relief in *Long Island R.R.* v. *Brotherhood of R.R. Trainmen,* the court observed with respect to Section 2 First that "[t]o effectuate the purposes of the Act and to prevent a mockery of its requirements such efforts [to settle] must be reasonable and made in good faith and not simply to satisfy perfunctory compliance." 185 F. Supp. at 358. And in *Pan American World Airways, Inc.* v. *Brotherhood of Ry. Clerks,* the court responded to the union's argument that " '[t]here is no requirement in the Railway Labor Act that a Union bargain in good faith' " by saying: "To this the Court cannot agree. If compliance with the Act need only be perfunctory, the congressional mandate would be defeated and the purposes of the Act rendered nugatory." 185 F. Supp. at 353. In short, as the court in *KLM Royal Dutch Airlines* put it: "Good faith effort to resolve disputes and exhaustion of the process is a condition precedent to the use of economic pressures and forces." 49 CCH Lab. Cas. at p. 31,496.

4. *The Fifth Circuit.* In the Fifth Circuit also the justiciability of claims under Section 2 First is clearly established. In *United Industrial Workers* v. *Galves-*

ton Wharves, 400 F.2d 320, 324 (1968), the Court of Appeals observed that the District Court had correctly ordered the carrier to bargain in good faith because "the Act requires that . . . the parties must make every reasonable effort to settle their differences in conference" and because " 'one of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all parties . . . to negotiate . . .' [citing *Elgin, J. & E. Ry.* v. *Burley,* 325 U.S. 711, 721 n. 12]." In *Richardson* v. *Texas & N.O. R.R.,* 242 F.2d 230, 235 (1957), the court held a carrier liable for entering into racially discriminatory collective bargaining agreements because Section 2 First "imposed directly upon the Railroads the duty to 'make and maintain agreements' in compliance with the provisions of the Railway Labor Act. . . ." And in *Southern Ry.* v. *Brotherhood of Locomotive Fire. & Eng.,* 223 F. Supp. 296, 308 (M.D. Ga. 1962), *aff'd,* 324 F.2d 503 (1963), the District Court, in an opinion adopted by the Court of Appeals, dismissed a carrier's injunction suit as premature but, citing a number of decisions discussed in this brief, said that "should . . . a strike become imminent" the carrier could seek relief again "if willing to assume the burden of proving that the defendants have not complied with their statutory duty to bargain in good faith." Finally, and most recently, in *Atlanta & W.P.R.R.* v. *United Transportation Union,* 307 F. Supp. 1205 (N.D. Ga. 1970), the court enjoined a strike on the ground that, though meetings between the parties had been held, they had not been of such character as to meet the statutory requirement of good faith bargaining and that therefore the procedures of the Act had not been exhausted:

> "What the Act positively requires, where a major dispute is involved, is genuine, good-faith nego-

> tiations . . . If either party refuses to negotiate it may be compelled to do so by mandatory injunction. This is necessarily true, else the whole elaborate 'cooling-off' procedures set up by the Act could be set at naught at the whim of either party, disrupting interstate commerce and fomenting the very evils which the Act was designed to prevent." *Id.* at 1210.

See also *National Airlines, Inc.* v. *International Ass'n of Machinists,* 416 F.2d 998, 1003 n. 3 (1969).[26]

The short of it is that there is a large and consistent body of federal case law rooted in this Court's decision in *Virginian* that reflects a settled conviction that Section 2 First imposes judicially enforceable duties. The decision of the Court of Appeals below stands alone.

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[26] Five District Court decisions in other circuits are relevant. In *Flight Engineers Int'l Ass'n* v. *Trans World Airlines, Inc.*, 305 F.2d 675 (8th Cir. 1962), the District Court, in an unreported decision subsequently vacated as moot, granted a strike injunction on the basis of a violation by the union of Section 2 First. In *Northwest Airlines, Inc.* v. *Airline Pilots Ass'n*, 185 F. Supp. 77, 80 (D. Minn. 1960), the District Court entertained an injunction claim grounded upon an asserted violation of Section 2 First, but found that the carrier had not "discharged . . . its burden of showing an absence of good faith" on the part of the union. In *Capitol Airways, Inc.* v. *Air Line Pilots Ass'n.*, 41 CCH Lab. Cas. ¶ 16,739, at p. 23,837 (M.D. Tenn. 1961), the court found jurisdiction to issue a declaratory judgment because of Section 2 First, "which imposes upon all carriers and their employees the duty to exert every reasonable effort to make and maintain agreements. . . ." Finally, temporary restraining orders were issued in two cases in the crew consist controversy brought under Section 2 First after all the formal procedures of the Act had been exhausted. See note 7 *supra.*

III. BOTH THE COURTS AND THE NATIONAL MEDIATION BOARD ARE OF THE VIEW THAT THE BOARD IS NOT CHARGED WITH THE RESPONSIBILITY OF ENFORCING SECTION 2 FIRST.

As we noted in our introductory comments (*supra* p. 26), while it is not essential to our position to demonstrate that the National Mediation Board does not have the sort of adjudicatory responsibility ascribed to it by the lower court, it is, in our view, essential to respondent's position to demonstrate that the Board *does* have that enforcing role. Accordingly, in discussing the language and history of the statute, we have dealt with the materials that bear upon the role of the Board as well as those that bear upon the justiciability of Section 2 First. It remains to consider the views expressed by the courts respecting the functions of the Board, as well as the materials that disclose the Board's own conception of its responsibilities. For here again, as with respect to its ruling respecting justiciability, the lower court's view of the role of the Board is wholly unprecedented.

A. Judicial Opinions Respecting the Role of the National Mediation Board.

First, judicial opinions faithfully reflect the legislative purpose that, except with respect to representational disputes as to which Section 2 Ninth invests the Board with decisional authority, the Board has no adjudicatory role. As this Court said last Term, "[t]he Mediation Board has no adjudicatory authority with regard to major disputes, nor has it a mandate to issue regulations construing the Act generally." *Detroit & T.S.L. R.R.* v. *United Transportation Union*, 396 U.S. 142, 158-159 (1969). And in *Elgin, J. & E. R. R.* v. *Burley*, 325 U.S. 711, 727 (1945), in interpreting the adjustment board provisions of the

Act, the Court observed that the "procedure adopted is not one of mediation and conciliation only, like that provided for major disputes under the auspices of the Mediation Board," but that rather "[a]nother tribunal of very different character is established with 'jurisdiction' to determine grievances and make awards concerning them." See also *Chicago, R.I. & P. R.R.* v. *Switchmen's Union*, 292 F.2d 61, 67 (2d Cir. 1961), where the court said that Section 2 First issues come to the courts "without the advance administrative screening provided under the National Labor Relations Act"; *Pan American World Airways, Inc.* v. *International Bro. of Teamsters*, 275 F. Supp. 986, 995 (S.D. N.Y. 1967), *aff'd on basis of opinion below sub nom. Brotherhood of Ry. Clerks* v. *Pan American World Airways, Inc.*, 404 F.2d 938 (2d Cir. 1969), where the court said that "mediation proceedings are designed merely to bring the parties to an agreement" and that "[i]n such mediation the Board performs no adjudicative function. . ."; and *Brotherhood of Locomotive Fire. & Eng.* v. *NMB*, 410 F.2d 1025, 1030 n. 16 (D.C. Cir. 1969), where the court held that the Act has given the Mediation Board no jurisdiction to determine whether or not the proposals of the parties are bargainable within the meaning of the statute.

In addition, a recent opinion by the District of Columbia Court of Appeals contains a detailed examination of the nature of the services performed by the Board. *International Ass'n of Machinists* v. *NMB*, 425 F.2d 527 (D.C. Cir. 1970). That opinion, which draws heavily upon the legislative history of the Act set forth earlier in this brief (*supra* pp. 39-41), supports our view that the Congress believed that granting ad-

judicatory power to the Board would compromise its mediatory role. The court had this to say:

> "... It is because the mediator acts as a catalyst for settlement rather than a judge that the Supreme Court was minded to say—'The concept of mediation is the antithesis of justiciability.' [*General Committee* v. *Missouri-K.-T. R.R.*, 326 U.S. 323, 337 (1943)]. ...
>
> . . . . . .
>
> "The Railway Labor Act of 1926 was drafted by a committee representing railroads and railroad unions. ... The committee hearings reveal the essential ingredients and underlying philosophy of the proposal expressed by the principal spokesman [sic] for both labor and management. The mediation board is to operate in private conferences, not public sessions. The board will confine itself to the function of conciliation and persuasion, exerting its good offices to bring the parties together. It will not make findings, or even statements to the public, for these would undercut its status as a body recognized by both sides as impartial, and would impair its ability to constitute a significant force for conciliation, not only in the particular case, but in general and in the future. Stressed and restressed was the need to retain the board in a position where it could operate by conciliation and persuasion, and the view that this position would be undercut if it gave statements or opinions, for the party standing condemned by the thrust of such a statement would or at least might conclude that the board was being unfair" (footnotes omitted). 425 F.2d at 538-39.

B. The Practice of the National Mediation Board.

This judicial understanding of the role of the Board This judicial understanding of the role of the Board is paralleled by the Board's own view of its authority. So far as we have been able to discover, the Board has

never exercised the statutory function that the lower court in the case at bar says it has. We have examined each of the thirty-five annual reports of the Board, its four published summaries of its work,[27] and the annual reports (1927-1934) of the predecessor Board of Mediation. While each of these documents describes the functions of the Board in detail, none of them so much as hints that the Board believes it has the authority or the duty respecting Section 2 First questions attributed to it by the court below. Rather, the Board consistently speaks of its role as confined to informal conciliation and mediation. Thus, for example, in its *Sixteenth Annual Report* (1950), the Board, in describing the structure of the Act and the character of the Board's responsibilities, said:

> "The National Mediation Board has no enforcement powers but acts purely as a mediatory agency, which means that its representative sits as a friendly officer of the United States Government, armed only with the weapon of friendly counsel and practical assistance in an effort to make collective bargaining successful" (p. 17).[28]

The report on the Mediation Board by the Attorney General's Committee on Administrative Procedure in 1941 agreed. As the Board observed in its *Seventh Annual Report* (1941) (p. 4), "the Committee remarked that:

> " 'Although the mediation activities of the Board are of very considerable importance in assuring uninterrupted transportation by rail and

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[27] *E.g., Administration of the Railway Labor Act by the National Mediation Board—1934-1957* (1958).

[28] See also, *e.g., Nineteenth Annual Report* (1953), pp. 22-23; *Twenty-fourth Annual Report* (1958), pp. 5-6; *Twenty-fifth Annual Report* (1959), pp. 4-5; *Twenty-sixth Annual Report* (1960), p. 5; *Twenty-seventh Annual Report* (1961), p. 5.

air, they do not lend themselves to procedural study. By definition they are of an informal nature, involving negotiation rather than decision.' "

Moreover, three former chairmen of the Mediation Board or its predecessor, the Board of Mediation, have indicated quite clearly that neither board passed upon questions such as whether the parties were in compliance with Section 2 First. Mr. Samuel E. Winslow, Chairman of the Board of Mediation, testifying before a Senate Committee considering the 1934 amendments to the Act, stated that the Board "has had no power of decision," that is, "[a]ny decision which the Board would have to make as between parties in interest," and that "there has been nobody in the mediation work to tell [the parties] that they must do this or they must do that." [29] The first Chairman of the National Media-

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[29] "To amend the Railway Labor Act," *Hearings before the Senate Committee on Interstate Commerce on S. 3266*, 73d Cong., 2d Sess. (1934), pp. 134, 138.

The Congress, while amending the Act so as to give the Board the authority to decide representational disputes (see p. 31 n. 10 *supra*), agreed with this appraisal of the Board's role respecting major disputes and noted that the amendments would work no change respecting major disputes. Thus, the Senate Committee said:

> "The present [mediation] board has many accomplishments to its credit. It has had many difficult tasks to perform. *Its powers are wholly persuasive.*" (Emphasis supplied.) *S. Rep. No. 1065*, 73rd Cong., 2d Sess. (1934), p. 3.

And the House Committee stated:

> "The bill does not introduce any new principles into the existing Railway Labor Act, but it is designed to amend that act in order to correct the defects which have become evident as a result of 8 years of experience. It does not change the methods of conference, mediation, and voluntary arbitration to settle major disputes over wages and working conditions, which are provided in the Railway Labor Act of 1926, now in effect." *H. Rept. No. 1944*, 73rd Cong., 2d Sess. (1934), p. 2.

tion Board, William M. Leiserson, wrote while in office that the mediators of the Board must "get the parties to agreement" "by mediation only" and "must not act as arbitrators, or they will render themselves useless for future mediation work."[30] And Mr. Howard Gamser, in a speech given just last year, pointed out some of the problems the Board would encounter if it attempted to depart from these principles and to enforce Section 2 First by refusing to release a case from mediation.[31]

That the Board has not attempted to decide Section 2 First questions—and also that it believes that 2 First is judicially enforceable—is confirmed by a brief *amicus curiae* for the United States in *Chicago, R.I. & P.R.R.* v. *Switchmen's Union,* 187 F. Supp. 581 (W.D. N.Y. 1960), *reversed,* 292 F.2d 61 (2d Cir. 1961). There the United States not only argued that Section 2 First was justiciable, but it also indicated that the position of the Board was that the practice of the union in that

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[30] Leiserson, *Right and Wrong in Labor Relations* (1938), pp. 80, 81.

[31] In that speech, Mr. Gamser, Chairman in 1965 and 1968, said that "[s]ome airline spokesmen" had maintained that the Board should not begin mediation until it concluded that the parties had complied with their Section 2 First duties, and that the Board also should not release a case from mediation "if either party has not, in the opinion of the Board, 'made every effort to resolve the dispute . . . .'" That is, those "spokesmen" took the position adopted by the lower court in the case at bar. Mr. Gamser characterized this as advocating a "greater exercise of discretion than heretofore employed" by the Board, questioned whether there is "statutory language to allow the Board to make such a determination," and discussed the procedural steps—such as investigations and hearings—that might have to be employed. "The Role of Mediation in Airline Labor Disputes," "Symposium on Air Transport Labor Relations," 35 *J. Air L. & C.* 313, 506, 510, 511 (1969).

case in submitting negotiated contracts to a referendum of its membership was contrary to the requirements of Section 2 First. Had the Board followed the course staked out for it by the opinion of the lower court in the case at bar, it would have decided the Section 2 First question against the union and would not have terminated mediation—thereby foreclosing the union from striking—until the union abandoned the referendum practice.[32]

None of this is to say that the Board, in the exercise of its conciliatory function, is obliged to ignore actions of the parties that might, on judicial scrutiny, be adjudged violations of Section 2 First. The point is simply that under the statute the Board has no obligation one way or the other on that score. Under Section 5 it need only decide whether the prospects of settlement would be enhanced by its continuing mediation or whether they would not. See *International Ass'n of Machinists* v. *NMB*, 425 F.2d 527 (D.C. Cir. 1970). If

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[32] Commentary on the Board's role is sparse. However, Mr. Donald Richberg, the principal draftsman of the 1926 Act, seemed clearly to share the view that the Mediation Board does not make these kinds of decisions. In his book, *Tents of the Mighty* (1930), p. 196, Mr. Richberg, in explaining the provisions of the Act, stated that the Board's "mediators cannot issue orders to anyone" and that in view of this "one senator referred to mediation as some more of the 'rose-water' process." Some years later in *Labor Union Monopoly* (1957), p. 30, Mr. Richberg contrasted the "gentle functioning of the Railway Mediation Board, which has little power to decide anything" with the NLRB with its "sweep of decisions." See also Garrison, "Labor Relations in the Railroad Industry," 17 *Proc. Academy of Pol. Science*, 163, 166 (1937) ("Congress . . ., in creating the new Mediation Board, gave it no judicial functions."); Redenius, "*Airlines: The Railway Labor Act or the Labor Management Relations Act?*," 20 *Lab. L.J.* 293, 299 (1969).

the party serving the Section 6 notice simply refuses to engage in any meaningful negotiations, in one situation the Board might conclude to retain jurisdiction in the hope that this would work a change in attitude, and in another it might conclude that such a result would more likely obtain were mediation terminated. So, too, with respect to Section 2 First questions of a less subjective character, such as restriction on the bargaining authority of the negotiators by referendum requirements, as in the *Chicago, R.I.* case cited above, or by union convention directives respecting the sort of agreement to be negotiated, as in the case at bar and in the *Piedmont Aviation* case also cited above. See *supra* pp. 61-62, 76-77. Though in the *Chicago R.I.* case the Board thought the referendum requirement a breach of Section 2 First, it concluded that no useful purpose would be served by its refusing to terminate its services until the union rescinded that requirement. It evidently took the same view in *Piedmont* and in the case at bar with respect to the union resolution limiting the authority of the negotiators—an action that the Fourth Circuit, as we have noted, regarded as inconsistent with Section 2 First. Under our view of the statute, the Board was free so to act.

CONCLUSION

All the relevant considerations—the language of the Act, its legislative history, its purposes, its construction by this Court as well as the lower courts, and the practice of the National Mediation Board—converge on the same point: *Section 2 First is enforceable by the courts, not by the Board.* Accordingly, the judgment of the Court of Appeals should be reversed and

the case remanded for a determination respecting the merits of petitioner's claim.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1970

No. 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

v.

UNITED TRANSPORTATION UNION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus* in support of the position of the United Transportation Union is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of one hundred and twenty-one national and international unions having a total membership of approximately thirteen million five hundred thousand working men and women. Its affiliates include the Union involved in the instant case and many other unions representing railroad and airline workers as well. Nevertheless, the Federation has rarely filed briefs *amicus* in cases involving the Railway Labor Act, as amended, 44 Stat. 577, 45 U.S.C. 151 *et seq.* recognizing that they normally present special problems growing out of a "state within a state . . . [having] its own customs and its own vocabulary [which] lives according to rules of its own

making." Garrison, *The Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J., 567, 569 (1937). However, it is our belief that the instant case is illuminated by basic propositions of law already fully developed by this Court in decisions construing the nature and effect of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*, and that it touches vital interests safeguarded by the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101 *et. seq.* Since the AFL-CIO has been intimately associated with the development of these principles, and since the decision here may well have ramifications in situations not governed by the RLA, we venture an expression of our views as to the correct resolution of the problem presented.

ARGUMENT

FUNDAMENTAL FEDERAL LABOR LAW PRINCIPLES, ESTABLISHED BY THE RLA AND THE NORRIS-LAGUARDIA ACT, PRECLUDE THE ISSUANCE OF THE STRIKE INJUNCTION SOUGHT HERE

This is a "strike injunction suit" (Pet. Br. 24). It was filed *precisely at the juncture* (some four and one half years after service of the § 6 notices) when the process of negotiation, mediation, voluntary arbitration and conciliation, mandated by the Railway Labor Act, as amended, 44 Stat. 577, 45 U.S.C. 151 *et seq.*, had "work[ed] its way" through "the detailed framework to facilitate voluntary settlement" during which "neither party may unilaterally alter the status quo," *Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969) and "both parties . . . [were therefore] relegated to self help . . . compulsory arbitration not being provided," *Railway Employees* v. *Florida E.C.R. Co.*, 384 U.S. 238, 244 (1966). And while the Company's substantive arguments focus on the duty to bargain in good faith, its Complaint and Motions for a Restraining Order and a Preliminary Injunction make it perfectly plain that the basic purpose of this litigation is to frustrate resort by the Union to its "ultimate sanction . . .

the strike," *ibid.* For the sole relief requested was the prohibition of union self help; no order requiring the Union to negotiate in good faith was sought (A. 8, 9, 11). Thus here as in *Railroad Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, 331 (1960):

> "According to the verified complaint filed . . . by the Company . . . 'This is an action for injunction to restrain and enjoin the calling and carrying out of a wrongful and unlawful strike or work stoppage on plaintiff railroad.' Section 4 of the Norris-LaGuardia Act provides, however, that 'No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of *any labor dispute* to prohibit any person or persons . . . from . . . (a) Ceasing or refusing to perform any work or to remain in any relation of employment;' . . . The main question in this case then was, and still is, whether this prohibition of the Norris-LaGuardia Act bars an injunction in the circumstances of this case." (Emphasis in original.)

The Company's theory to justify this extraordinary relief is (a) that the portion of § 2 First stating that the parties shall "exert every reasonable effort to make . . . agreements . . . and to settle all disputes" imposes a duty to bargain in good faith (Pet. Br. 12-14, 42-47, 60 n. 21); (b) that the courts are empowered to determine whether there has been a violation of that obligation (Pet. Br. 27-42, 47-78); and (c) that acceptance of these two propositions necessarily entails the conclusion that the courts are free upon finding bad faith bargaining to enjoin otherwise lawful self help (Pet. Br. 5, 24-25). Thus, the rhetoric of its position is carefully designed to focus attention on the issue of justiciability. The unique considerations raised by the fact that this is a "strike injunction suit" are noted and dismissed in the first two pages of a 55 page argument (Pet. Br. 24-25). This allows evasion of the substantial objections to the remedy sought by the Company.

To put the matter in perspective we shall therefore assume *arguendo* for the purposes of this brief that under the RLA the courts do have the power to enforce a duty

to bargain in good faith.[1] That assumption does entail the conclusion that some form of injunctive relief is available to require a party, which has failed to meet this obligation, to negotiate properly. That is the lesson of *Virginian Ry. v. Systems Federation*, 300 U.S. 515, 544-550 (1938), where this Court held that a refusal to treat could be remedied by an order requiring "the employer to meet and confer . . . to listen to [his employees] complaints, to make reasonable effort to compose differences . . ." But there is no decision of this Court holding that the courts also have the power to enjoin otherwise lawful self help on the ground that there has been a failure to bargain with that good faith which § 2 First requires. The Company's Brief to the court below, at p. 28, squarely recognized "[t]here is no Supreme Court decision involving the validity of a strike injunction bottomed upon a violation of Section 2 First." Thus this case raises a question of first impression under the RLA. It should be decided by affirmance of the lower courts' denial of relief. For the most fundamental principles of federal labor law preclude such injunctions—as we shall now demonstrate.

1. This Court has not developed an RLA law of good faith bargaining. The few asides which can be gleaned from the cases beginning with the *Virginian* (Pet. Br. 48-60) are so inconclusive that the lower courts are in disagreement as to whether such a body of law does, or should, exist compare, A. 222-228, with, *Piedmont Aviation v. ALPA*, 416 F.2d 633 (C.A. 4, 1969), *certiorari denied*, 397 U.S. 926. This does not mean that there is no relevant corpus of experience. Under this Court's guidance the National Labor Relations Board, and the Courts of Appeals, have explicated the command contained in §§ 8(a)(5), 8(b)(3) and 8(d) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*

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[1] The forceful arguments demonstrating that the portion of § 2 First in question is not justiciable are fully developed in the Union's Brief. Since we agree fully with the points made there we do not repeat them in our presentation. Naturally, if the Union's arguments are accepted it would be unnecessary to reach the position developed herein.

that the parties covered by that statute shall "confer in good faith." Thus, mindful of the admonition that the NLRA "cannot be imported wholesale into the railway labor arena" and that even "rough analogies must be drawn circumspectly" we begin by turning to the "law developed during the more than 30 years of administering our most comprehensive national labor scheme" as "[t]his Court has in the past . . . for assistance in construing" the RLA, *Jacksonville Terminal*, 394 U.S. at 383. We do so because we believe that the NLRA development underscores two points of critical significance here.

First, the concept of good faith bargaining is by nature complex and elusive. It is all but impossible to cabin by definition. Where there has been bargaining, as opposed to a simple failure to treat, the conclusion that a party has failed to fulfill its obligations requires an essentially subjective determination grounded in a detailed study of the entire course of the negotiations. This complexity stems from a basic tension which characterizes both the RLA and the NLRA and which this Court explained in the following terms in *NLRB* v. *Insurance Agents International*, 361 U.S. 477, 485-486 (1960):

> "Collective bargaining . . . is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract . . .
>
> "But at the same time, Congress was generally not concerned with the substantive terms on which the parties contracted. Cf. *Terminal R. Assoc.* v. *Brotherhood of R. Trainmen*, 318 U.S. 1, 6. Obviously there is tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground."

Because of the nature of the substantive law, administration of the good faith bargaining obligation is an extremely sensitive task which has proved difficult even for

"an agency with administrative expertise," cf., *Jacksonville Terminal*, 394 U.S. at 391-392. The NLRB has drawn the fire of Congress for allegedly having:

> "gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concession an employer must make and of the proposals that he may or may not make," H.R. Rep. No. 245, 80th Cong., 1st Sess., 19 (1947).

Additional Congressional guidance and twenty-three years more experience have not noticeably advanced the state of the art. In the past month both the District of Columbia and the Fifth Circuits have had occasion, in opinions reversing the Board, to point out the subtleties involved in determining whether good faith bargaining has occurred:

> "There is evidence in the record from which to conclude that the Employer was not acting in good faith . . . the record reflects no glory on this Employer . . . At the same time it is well to point out that the negotiation of labor contracts is not a gentle art. Both labor and management have a great deal at stake when sitting down at a bargaining table and this is reflected in the language used and in the proposals advanced for consideration. This court and the Board each must remain aware of how difficult it is to capture the tone of such proceedings from an outside vantage point. What may appear to be an unreasonable, obdurate demand may be no more than the skillful practice of the negotiator's art, designed to wring concessions from the opposite side. Congress has excluded the Board from interfering in this process no matter how strongly it feels about the merits of the proposals under discussion.
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> • • •
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> "The Board is authorized to oversee and enforce the duty of employer and union 'to bargain collectively . . . in good faith,' but Congress has made it clear that the obligation of good faith bargaining 'does not compel either party to agree to a proposal or require the making of a concession.' 29 U.S.C. § 158(d) (1964). Since the statute involves no compulsion on either party to make a concession or agree to a proposal, then obviously the agency designated to execute the statute is without power to effect a similar compul-

sion. *N.L.R.B.* v. *American National Ins. Co.*, 343 U.S. 395 (1952). Thus it is a fundamental proposition of labor law that the Board's power in this sphere is rigorously limited; . . . This leads us to the crux of the problem in the instant case. If we accept the proposition 'that [section] 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements' (*N.L.R.B. v. Insurance Agents, supra*, 361 U.S. at 487) then we cannot give our approbation to the Board's finding that the Employer was guilty of bad faith bargaining if that finding is based on the fact that the Board did not approve of certain of the proposals advanced by the Employer in the course of negotiations. . . . [For] the Board [must be] careful to observe the distinction between, on the one hand, a permissible inference of bad faith drawn from the proposals the Employer advanced and, on the other hand, an impermissible attempt to compel the Employer to accept certain terms or make certain concessions, an attempt in violation of section 8(d) of the Act.

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"This argument proceeds admittedly on a fine distinction, but the distinction was drawn not by us but by Congress and we have no alternative but to enforce it to the best of our ability." *Steelworkers* v. *NLRB (Florida Machine & Foundry Co.)*. — F.2d —, 75 LRRM 2790, 2792-2794 (C.A. D.C., Dec. 4, 1970); see also, *M.R.&R. Co.* v. *NLRB*, — F.2d —, 75 LRRM 2705 (C.A. 5, Nov. 24, 1970).[2]

Insurance Agents, and the cases following it, demonstrate that the duty to bargain in good faith does not provide a sound base for strike injunctions. This is particularly plain in regard to preliminary relief. The complexity

[2] While the Company (Pet. Br. 13-14) relies on the NLRA rule that "surface bargaining" is insufficient, it fails to note the large body of law applying that doctrine. These cases show both that the "surface bargaining" concept in particular resists further refinement, see e.g., *General Electric Co.*, 150 NLRB 192 (1964), *enforced*, 418 F.2d 736 (C.A. 2, 1969) *certiorari denied*, 397 U.S. 965, and that there is substantial doubt as to the validity of the Company's claim of a violation, see, e.g., *Philip Carey Mfg. Co.*, 140 NLRB 1103, 1104-1105 (1963), *affirmed in relevant part*, 331 F.2d 720 (C.A. 6, 1964), *certiorari denied*, 379 U.S. 888.

of the issue presented and the necessity to examine the entire course of the negotiations all but preclude the possibility of disciplined decision making at the temporary restraining order or preliminary injunction stage. And Frankfurter and Greene's The Labor Injunction (1930) teaches that where the standards are amorphous the tendency of the District Courts in labor disputes has been to grant preliminary relief with a free hand on the theory that maintenance of the status quo is an absolute value. Moreover, even after a full hearing a high percentage of District Court error must be expected. The ultimate conclusion that there has been a failure to bargain in good faith rests on an extremely subtle balance of considerations. Striking the proper balance requires a deep and continuing familiarity with normal bargaining practices. Because of the structure of our labor law, which largely bypasses the District Courts, few federal judges can be expected to possess the degree of knowledge required.

The foregoing points, going as they do to considerations of substantive law, would be valid even if this were not a "strike injunction suit." We emphasize them because the possibility of such an injunction so exacerbates these problems as to make a qualitative difference. The parties governed by any complex, subtle, and amorphous legal standard are always tempted both to structure their actions so as to strengthen their litigating posture, and to litigate with inadequate cause. For there is always a real possibility of carrying the day. The extent to which such manipulation of the legal process occurs depends on the potential rewards. Here they are particularly great: the opportunity to deprive an adversary of the right to utilize its ultimate sanction—self help; and even failing that ultimate goal the substantial reward of maintaining an economically advantageous situation while judicial consideration proceeds. Thus if the Company's position here is accepted it is a virtual certainty that every unsettled major dispute will be brought to the federal courts on allegations of bad faith bargaining. Depending on their comparative strength, and the advantages to be gained by further delay, either man-

agement or labor will always find it to their tactical interest to tie up their opponent; and given the nature of bargaining and of the governing law the development of a viable theory, and the drafting of a colorable complaint, will rarely present a problem. For as Professor Cox has noted, in discussing a proposal for final judicial settlement of emergency disputes:

> "In any difficult labor negotiations the parties' willingness to compromise hinges largely on the absence of acceptable alternatives. If there is any other recourse—if there is a way to buy time, or evade responsibility for making a concession—there is great pressure to choose the alternative," 113 Cong. Rec. 30350 (1967).

Indeed, given these pressures it is not too much to expect that an essential part of bargaining strategy will be to elicit statements, or actions, which appear to lend substance to the claim of a violation.

The facts of the instant case appear to support an inference that the deleterious process of bargaining with an eye to judicial preclusion of self help rather than with full attention to settlement of the dispute is already well under way. The incidents upon which the Company's claim rests occurred between March 1968 and June 1969 (Pet. Br. 12-14; A. 33-47). There was no attempt to put bargaining back on the track by seeking immediate relief in the form of an order requiring the Union to discontinue its allegedly illegal practices and to bargain properly. Instead these charges were held back, like an ace in the hole, until December 1969 when the Union's right to self help had matured. At that point they were unveiled in the service of an application for a strike injunction (A. 8, 9, 11).

As we have stressed, pp. 2-4, *supra*, and as the foregoing illustrates, the Company's concern is with precluding union self help. Its legal strategy to accomplish that end is to take it as given that an order returning the parties to the position they might have occupied but for the violation is the *only* proper remedy for a failure to bar-

gain in good faith. The second basic lesson of the NLRA experience is that this premise cannot withstand scrutiny.

Under the NLRA the normal remedy for this violation is an order to cease and desist bargaining in bad faith and to commence proper negotiations, see, e.g., *H. K. Porter* v. *NLRB*, 397 U.S. 99, 101 (1970). Indeed, even though the limitations of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101 *et seq.*, would not apply, see, § 10(h) of the NLRA, we are unaware of a single strike injunction based on a failure to bargain in good faith.[3] Thus, orders having a completely prospective effect are the norm under the NLRA. This Court underscored this fact just last term in *H. K. Porter*. There the employer failed to bargain in good faith on the issue of the checkoff of union dues. Its refusal to grant the unions request "was based on a desire to frustrate agreement and not on any legitimate business to grant the union's demand; reasoning that but for the vio- reason." On these facts the Board ordered the employer to grant the union's demand reasoning that but for the violation there would have been agreement, the employer having no good faith objection. The remedy decreed was therefore designed to put the union in the position it would have occupied if there had been no violation. See, 397 U.S. at 100-102, 107. This Court reversed, stating (397 U.S. at 107-109):

> "It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. . . . The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. . . . In this case the Court [of Appeals] apparently felt that the employer was trying effectively to destroy the union by refusing to agree to what the union may have considered its most im-

[3] Even where there is an illegal insistence on a non-mandatory subject of bargaining under *NLRB* v. *Borg-Warner*, 356 U.S. 342 (1958), the remedy is confined to an order to cease such insistence. If the party which violated the *Borg-Warner* standard also has a lawful demand on the table its right to engage in self help is left unimpaired, e.g., *Alpert* v. *ITU*, 161 F. Supp. 427 (D. Mass. 1960).

portant demand. Perhaps the court, fearing that the parties might resort to economic combat, was also trying to maintain the industrial peace that the Act is designed to further. But the Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse. It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining."[4]

Just as the NLRB is limited to remedies which carry out the policies of the NLRA, the courts are limited to remedies which carry out the policies of the RLA and are consistent with so much of Norris-LaGuardia as is "reconcilable" with the RLA, *Trainmen* v. *Chicago R&I.R. Co.*, 353 U.S. 30, 40 (1957). In *H. K. Porter* the remedy sought was denied since it was found incompatible with the basic policy of "freedom of contract," 397 U.S. at 107-108. In the instant case the strike injunction sought is incompatible with the basic policy underlying the RLA's provision for a final 30 day "cooling off" period, and with the core purpose of Norris-LaGuardia.

2. Under the RLA, no less than the NLRA, "collective bargaining with the right to strike at its core, is the essence of the federal scheme," *Bus Employees* v. *Missouri*, 374 U.S. 74, 82 (1963). The central position of self help is inherent in the system of free collective bargaining fostered by both statutes:

> "It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The

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[4] *H. K. Porter* presented a far stronger claim for a "but for" remedy than the instant suit. In that case there was a rational predicate for the view that agreement would have been reached absent a violation. Here on the other hand, given the fact of 10 years of negotiation, arbitration, and conciliation, it is all but impossible to believe that the Union's alleged "surface bargaining" caused the failure to agree, compare, *Philip Carey Mfg. Co.*, 140 NLRB at 1104-1105.

> parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system . . ." One writer recognizes this by describing economic force as a 'prime motive power for agreements in free collective bargaining.' . . ." *Insurance Agents*, 361 U.S. at 488-489.

The critical role played by "the presence of economic weapons in reserve" in the bargaining process has caused this Court to stress the point that it is not permissible to strike such weapons from the parties' hands without a specific warrant from Congress. Any other rule would allow an administrative agency, or the courts, to exercise a "considerable influence upon the substantive terms on which the parties contract" since "negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess." And such influence is impermissible because "our labor policy is not presently erected on a foundation of government control of the results of negotiations." *Id.* at 490, see also, *H. K. Porter*, 397 U.S. at 102-104, 107-108.

It is a commonplace that the efficacy of self help is vitally affected by consideration of timing. There is "[n]o doubt [that] a union's bargaining power would be enhanced if it possessed . . . the power exclusively to determine when work stoppages should occur . . ." *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 310 (1965). Acting on this insight Congress in the RLA focused its attention on setting the time at which the right to self help shall mature. Regulation of economic weapons is centered on the provisions, §§ 6, 5 First and 10, requiring preservation of the status quo from the inception of negotiations through the final 30-day "cooling off" period, *Shore Line* v. *Transportation Union*, 396 U.S. 142, 150-153 (1969), and relegating the par-

ties to self help at that point, *Jacksonville Terminal,* 394 U.S. at 378-380.[5] The National Mediation Board has emphasized that judicial action to expand or contract the final "cooling off" period is inconsistent with the congressional plan. It has stated, in the context of whether a second proffer of its services creates an added "cooling off" period, that:

> "'In controversies of the type which come before the Board under Section 5, First, successful termination through mediation or arbitration requires some willingness by the parties involved to adjust or compromise, the points in dispute. Realization that failure to achieve settlement will lead, or is likely to lead, to strike action at the end of a 30-day stand-still period puts upon both parties pressure to avoid the consequences of this kind of economic warfare, seriously injurious to each of them.
>
> "'Such pressure would be materially dissipated if the statute means that after the procedures specified by Section 5, First, have been pursued to the end without avail, a subsequent proffer by the Board of its mediation services on the eve of a strike requires a repetition of these procedures and a second 30-day waiting period following notification of termination of the Board's emergency mediatory efforts. The parties would be aware that failure to effect settlement would not necessarily bring matters to a head 20 days thereafter. There would be the expectation that a strike called following termination of the required 30-day stand-still period would lead to a proffer of emergency mediation, and a repetition of the section's procedures and a second 30-day stand-still period.'" *Pan American World Airways* v. *Flight Engineers,* 306 F.2d 840, 848 (C.A. 2, 1962); see also, Memorandum for the National Mediation Board as *Amicus Curiae* in *Railroad Telegraphers,* No. 100, October Term 1959, pp. 4-10.

Thus, Congress has placed a limit on "the purposely long and drawn out proceedings" of the RLA, *Florida E.C.R.*

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[5] Congress has, of course, legislated *ad hoc* exceptions to this, and other, features of the RLA. These, however, do not form a predicate for judicial decision, *Jacksonville Terminal,* 394 U.S. at 379.

Co., 384 U.S. at 246, by enacting a "fixed cut off date," *Pan American Airways*, 306 F.2d at 846, for the moratorium on the use of self help. It has done so not because economic strife is of value in and of itself but because experience has made it plain that in the last analysis settlements are brought about by "pressure to avoid the consequences of economic warfare, seriously injurious" to the parties, compare, *Insurance Agents*, 361 U.S. at 489. The "fixed cut off date" established by the RLA is a basic incentive for settlement. It serves to maximize the pressure on the parties to settle by making it manifest to them that once the final "cooling off" stage has been reached matters will come to a head at a point certain. This is vital for in Professor Cox's words "in any difficult labor negotiation the parties' willingness to compromise hinges largely on the absence of acceptable alternatives," see, p. 9, *supra*.[6]

In reality then, the Company's position here, which is presented as a bulwark for peaceful settlement of "major" disputes, cuts against that object. It is designed to substitute a flexible cut off date set by the judiciary on a case by case basis for the "fixed cut off date" provided in the RLA. That, of course, would dissipate the pressures for settlement Congress was careful to enhance. The result would be to destroy the equilibrium of forces harnessed in the elaborate design of the RLA. The means proposed to achieve this result is the one this Court recognized as impermissible in *Insurance Agents*. The basic teaching of that case is that the power to oversee the duty to bargain in good faith may not be utilized as a charter to interdict the use of otherwise lawful economic weapons, see, 361 U.S. at 497-500. Yet here the Company seeks regulation of self help on the sole ground that the RLA's requirement of good faith bargaining justifies such regulation. The in-

[6] While this is the most clear cut and important limitation on judicial control of the timing of self help, it does not stand alone. The pace at which "major" disputes move through the RLA's processes is determined by the parties, the NMB, and the Executive, and the judiciary's power of review is narrowly circumscribed, see, e.g., *Machinists* v. *NMB*, 425 F.2d 527 (C.A. D.C., 1970).

evitable consequence of acceptance of its view would be an impermissible "intrusion into the substantive aspects of the bargaining process," *Insurance Agents*, 361 U.S. at 490. For this Court recognized in *Jacksonville Terminal*, 394 U.S. at 380-381, that:

> "The disputants' positions in the course of negotiation and mediation, and their willingness to submit to binding arbitration or abide by the recommendations of a presidential commission, would be seriously affected by the knowledge that after these procedures were exhausted a [court] would, say, prohibit the employees from striking or prevent the railroad from taking measures necessary to continue operating in the face of a strike."

Thus, on purely RLA grounds issuance of a strike injunction in the instant case would contravene the basic principles recognized in both *H. K. Porter* and *Insurance Agents*.

3. Norris-LaGuardia embodies a "'government hands off' philosophy of labor relations," Wellington and Albert, *Statutory Interpretation and the Political Process: A Comment On Sinclair* v. *Atkinson*, 72 Yale L.J. 1547, 1555 (1963). The RLA and the NLRA on the other hand embody a philosophy of *limited* governmental regulation. This Court has, therefore, concluded that since:

> "this shift in emphasis was accomplished . . . without extensive revision . . . of the anti-injunction section of the Norris-LaGuardia Act . . . it became the task of the courts to accommodate, to reconcile the older statute with the more recent ones," *Boys Markets* v. *Local 770 Retail Clerks*, 398 U.S. 235, 251 (1970).

There can be no doubt that "accommodation," as used in *Boys Markets*, is not a soft euphemism for complete obliteration of Norris-LaGuardia. The holding of that case is "a narrow one," *ibid.*, which allows injunctions only against breach of contract strikes over disputes subject to final and binding arbitration. The vitality of *Local 795 Teamsters* v. *Yellow Transit Freight Lines*, 370 U.S. 711 (1962) holding that all other breach of contract strikes are

not enjoinable, remains unquestioned. And in the RLA context, which provided the genesis of the accommodation doctrine, this Court has emphasized the continuing relevance of Norris-LaGuardia:

> "The Norris-LaGuardia Act . . . expresses a basic policy against the injunction of activities of labor unions. We have held that the Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act. *Virginian R. Co.* v. *System Federation,* 300 U.S. 515, *Graham* v. *Brotherhood of Locomotive F. & E.* 338 U.S. 232. However, the policy of the Act suggests that the courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right." *Machinists* v. *Street,* 367 U.S. 740, 772-773 (1961).

The "core purpose of Norris-LaGuardia" *Boys Markets,* 398 U.S. at 253, was succinctly stated in *Chicago River,* "the leading example of [the] accommodation process," 398 U.S. at 251:

> "The Norris-LaGuardia Act . . . was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining . . . Congress acted to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital." 353 U.S. at 40.

Moreover, the legislative history of Norris-LaGuardia demonstrates that such injunctions were disfavored not only as a matter of social policy, but also because they were the product of "free wheeling judicial exercises," *Jacksonville Terminal,* 394 U.S. at 382, "which made the lawfulness of a strike depend upon judicial views of social and economic policy," *Boys Markets,* 398 U.S. at 253 n. 22. In sum, Norris-LaGuardia rests on, and safeguards, essentially those considerations articulated in *Insurance Agents*—in a system in which there is no "government control of the results of negotiation" regulation of the use of economic weapons "on very general standards not drafted with reference to

specific forms of economic pressure" is impermissible because it amounts to an "entrance into the substantive aspects of bargaining to an extent Congress has not countenanced," 361 U.S. at 490, 497.

The instant case is a paradigm of the situations to which Norris-LaGuardia was intended to apply. The Company's object is to enjoin a "major" dispute strike. That strike was undertaken only after all the provisions of the RLA which speak directly to the timing of self help had been satisfied. The standard which is said to justify the injunction against this otherwise lawful self help is complex, elusive, and amorphous, and by its nature calls for highly subjective judgments, see, pp. 5-8, *supra*. The inevitable result of an injunction will be to upset the natural interplay of competing economic forces to the detriment of labor, and the advantage of capital, compare, *Chicago River*, 353 U.S. at 40.

There is not a single consideration of substance which cuts against the application of Norris-LaGuardia here. This is not a case in which a strike injunction is necessary on the ground that "that remedy alone can effectively guard the plaintiff's right," *Street*, 367 U.S. at 773. We recognize, on the authority of the *Virginian*, that if § 2 First is justiciable an injunction requiring good faith bargaining is permissible and, of course, may be sought at any stage either prior to or after the point at which the right to self help matures. For such limited injunctive compulsion does not invade the "core purpose of Norris-LaGuardia." That relief, the NLRA norm, "can effectively guard the plaintiff's right" especially if sought expeditiously prior to the time self help is permissible. And such expedition is of course desirable and to be encouraged. Moreover, the experience under the NLRA shows that there is nothing to the view that as a matter of logic a violation of the duty to bargain in good faith mandates an injunction against self help. The NLRA law has grown to maturity without that device. Indeed, any doubt which might possibly remain is removed by the drafters' understanding, which was that to the extent § 2 First was enforceable, court action would

be "consistent with the judicial powers and its limitations" and that "the law for . . . compulsion . . . should be developed by the courts." Hearings On H. R. 7180, 69th Cong. 1st Sess., 40 (1926; Testimony of Donald R. Richberg), see also, 67 Cong. Rec. 4584 (1926; Remarks of Cong. Newton). Thus § 2 First can hardly be said to embody a congressional command for the issuance of strike injunctions.

Finally, contrary to the Company's claim (Pet. Br. 24-25) it is plain that this Court has never sanctioned injunctive relief at odds with the "core purpose of Norris-LaGuardia." The *Virginian* had nothing to do with the regulation of economic weapons. The purposes of Norris-LaGuardia were so inapposite in the *Steele* cases that the Court was moved to state that application of the anti-injunction provision "would indeed be 'to turn the blade inward,'" *Graham* v. *Locomotive Firemen*, 338 U.S. 232, 237 (1949). And both *Chicago River* and *Boys Markets* dealt with disputes subject to final and binding arbitration. When a strike is enjoined in that situation:

> "The union is not subjected . . . to judicially created limitations on its freedom of action but is simply compelled to comply with limitations to which it has previously agreed [or under the RLA which have been explicitly set by Congress]. Moreover, where the underlying dispute is arbitrable, the union is not deprived of any practicable means of pressing its claim but is only required to submit the dispute to the impartial tribunal that it has agreed to establish for this purpose." *Boys Markets*, 398 U.S. at 253 n. 22.

Thus, such controversies "are not the same as [the instant one] in which the injunction strips labor of its primary weapon without substituting any reasonable alternative," *Chicago River*, 353 U.S. at 41.

The sum of the matter is this: the theory of accommodation precludes strike injunctions in disputes which must be settled by free collective bargaining rather than final and binding arbitration, unless there is a clear and definite mandate from Congress requiring their issuance. Such in-

nctions are contrary to the "core purpose of Norris-
aGuardia," are not justified by the policies of the NLRA
RLA, and would therefore "undermine the vitality of
e Norris-LaGuardia Act," *Boys Markets,* 398 U.S. at
3. This being so affirmance of the result reached below
required.

CONCLUSION

For the above stated reasons the lower courts' denial of
e strike injunction sought here should be affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION,
Respondent.

BRIEF FOR RESPONDENT

OPINIONS BELOW

The Opinions of the Courts below are adequately presented in the Brief for the Petitioner.

JURISDICTION

The jurisdictional requisites adequately appear in the Brief for the Petitioner.

STATUTES INVOLVED

The provisions of the Transportation Act of 1920, ch. 91, Title III, § 301, 41 Stat. 456; the Railway Labor Act of 1926; ch. 347, §§ 1, 2, First, Second, Third and § 5, First, 44 Stat. 577; the Railway Labor Act of 1934, ch. 691, §§ 2, First, Second, Third, Fourth, Ninth and 5, First, 48 Stat. 1185 (now 45 U. S. C. 152 First, Second, Third, Fourth, Ninth and 155 First), *amending* the Railway Labor Act of 1926, 44 Stat. 577; the National Labor Relations Act of 1935, ch. 372, § 1, 49 Stat. 449 (now 29 U. S. C. § 151); the Labor Management Relations Act of 1947, ch. 120, §§ 1, 2(2), 2(3), 8(a) (5), 8(b) (3), 8(d), 10(b), 10(c), 10(j), 10(k), 61 Stat. 136 (now 29 U. S. C., §§ 141, 152(2), 152(3), 158(a) (5), 158(b) (3), 158(d), 160(b), 160(e), 160(j), 160(k), *amending* Labor Management Relations Act of 1935, 49 Stat. 449 are set forth in Appendix A.

QUESTION PRESENTED

Whether, subsequent to notice, conference and negotiation as required by Section 6 of the Railway Labor Act and mediation as required by Section 5 of the Railway Labor Act with respect to a major dispute between a railroad and the representative of its employees over a proposed change in their collective agreement having been exhausted, a justiciable issue exists as to whether a party made every reasonable effort, as stated in Section 2, First of the Railway Labor Act, to make an agreement, so that the exercise of self-help by a party to the dispute is to be dependent upon the ultimate judicial determination of such issue.

STATEMENT

Respondent considers petitioner's statement with respect to the continuation of the dispute between petitioner and the union's several general chairmen representing em-

ployees in the several districts of the railroad since June 1965 should be supplemented.

Throughout this Brief we will sometimes refer to the Petitioner, Chicago & North Western Railway Company as the "Petitioner" or the "Railroad" or "CNW"; the Respondent, United Transportation Union, which succeeded the Brotherhood of Railroad Trainmen on January 1, 1969, as "Respondent" or as the "Union" or "UTU," the Railway Labor Act as "RLA," the National Mediation Board as the "NMB" and the National Labor Relations Board as "NLRB."

The Award of Arbitration Board No. 282 authorized changes in collective agreements with respect to the minimum number of persons to be employed in crews and yard service, in branch line service and in other road service where the former agreement, rule or practice required the employment of less or more than a conductor and two trainmen; thus the Award did not provide for changes in agreements, rules or practices theretofore existing which required a minimum crew of a conductor and two trainmen in main line road service (Plaintiff's Ex. 1, Tr. 27-28; 41 Labor Arbitration Reports 678-679; Ptr. Br. 7-8).

On January 29, 1965, an agreement which became known as the "Luna-Saunders' Agreement" was made between the BRT, represented by its President, Charles Luna, and 28 railroads, represented by Stuart Saunders, Chairman of the Board, and A. E. Perlman, President of the Pennsylvania Railroad Company and William White, Chairman of the Board of the Erie Lackawana Railroad Company. That agreement resolved the crew consist dispute between the Union and the 28 railroads providing for virtually all crews employed on those railroads to consist of not less than a conductor and two trainmen in road service and a conductor or foreman and two helpers in yard service (A. 18; Def. Exh. 5, tab. 1, Tr. 338).

A similar agreement, which became known as the "Luna-Touhy Agreement," was made March 22, 1965 between the Union, represented by its President, Charles Luna, and William J. Touhy, President of the Baltimore & Ohio Railroad Company, representing that railroad and three other railroads (Def. Exh. 5, tab. 2, Tr. 338).

In July 1965, the Union's General Chairmen served a Section 6 notice on some 80 railroads—other than those which were parties to the "Luna-Saunders" and "Luna-Touhy" agreements, but including the several districts of the CNW and the Chicago and Great Western R. Co., which was separate from the CNW until it merged into and became a district of the CNW on July 1, 1968 (A. 31), which had obtained agreements or arbitration awards pursuant to the Award of Arbitration Board No. 282, changing the collective agreements to authorize reductions in the minimum number of persons to be employed in crews; the notices proposed an agreement to become effective at the expiration of the Award of Arbitration Board No. 282 on January 25, 1966, to require the employment of a minimum of a conductor and two trainmen in road service crews and a conductor or foreman and two helpers in yard service crews, which was identical to the notice served by the unions on September 7, 1960 (A. 5-6, 10, 18, 73-74; Tr. 226-228, 231).

The railroads refused to enter into negotiations with the union with respect to those notices claiming they were without legal effect; thereupon the union invoked the services of the National Mediation Board with respect to the dispute and the Board assumed jurisdiction in the Fall of 1965 (A. 18, 74, 92-93, 97).

In December, 1965, each of the 80 railroads on which the unions' general chairmen had served Section 6 notices in July, 1965, including the several districts of the CNW, served an identical Section 6 notice on each of the general

chairmen (A. 94), which was the same as the notices that had been served on November 2, 1959; each notice proposed a collective agreement eliminating every agreement, rule or practice, however established requiring a minimum number of persons to be employed in train and yard service crews and for management to have the unrestricted right to determine the number and craft of persons to be employed in such crews (A. 53-54, 74-75, 79, 94). The notices also proposed that each railroad's notice be handled by the general chairman on whom it was served, concurrently with the notice theretofore served by the general chairman on the railroad and that, if no agreement should be reached by the union's general chairman and the railroad, that the general chairman join with other general chairmen on whom the same notice had been served by other railroads to create an employees' national conference committee to represent them and to negotiate the dispute to a conclusion with the railroads' Regional Conference Committee and the National Railway Labor Conference (A. 6, 10, 18-19, 32, 51-54, 74-75, 79, 105).

The unions' general chairmen met with officers of the railroads, including officers of the CNW, on January 18, 1966, and declined to agree to the railroads' proposed change in the collective agreements, to the railroads' proposals to handle the railroads' December notices concurrently with the general chairmen's July notices and to join other general chairmen on which other railroads had served the same December notice to establish a national employees conference committee to handle the dispute to a conclusion (A. 6-10, 18-20, 32-33, 106; Tr. 231, 403).

During January, 1966, the unions called up on the railroads to put into effect, upon the expiration of the Award of Arbitration Board No. 282, the crew consist agreements, rules and practices which had been in effect prior to the enactment of Public Law 88-108 (A. 19-20).

The railroads, including the several districts of the CNW and the Chicago Great Western invoked the services of the National Mediation Board with respect to the dispute arising from the notices served by them in December on the unions' general chairmen (A. 95). After the National Mediation Board assumed jurisdiction of the dispute, the National Railway Labor Conference sought to persuade the Board to concurrently mediate the disputes arising from the notices served in July, 1965, by the unions' general chairmen and on the general chairmen by the railroads in December, 1965 as a single national dispute rather than on a railroad by railroad or notice by notice basis, as the Board had commenced to do with respect to the notices served by the unions' general chairmen on the Atlantic Coast Line Railroad Company, the Boston & Maine Railroad Company and others (A. 21, 95-96, 99). The National Mediation Board, however, rejected the National Railway Labor Conference's suggestion, and continued to handle the disputes on a railroad by railroad, notice by notice basis (A. 173-174).

On January 19, 1966, at the direction of National Railway Labor Conference, the CNW and its several districts and the Chicago Great Western R. Co. and the other railroads upon which the unions' general chairmen had served the July, 1965 notices and which had served the December, 1965 notices upon those general chairmen (A. 174; Tr. 391, 393) filed *Akron & Barberton Belt R. Co., et al. v. Brotherhood of Railroad Trainmen, et al.*, 250 F. Supp. 691, 252 F. Supp. 207, 254 F. Supp. 306 (D. D. C. 1966), 385 F. 2d 581, 599 (D. C. Cir. 1967), *cert. den.*, 390 U. S. 923 (1968) and *Akron & Barberton Belt R. Co., et al. v. Order of Railway Conductors and Brakemen*, 253 F. Supp. 538 (D. D. C. 1966), 385 F. 2d 581, 598 (D. C. Cir. 1967), *cert. den.*, 390 U. S. 923 (1968).

After the final decision of the District Court in the *Akron & Barberton Belt* cases, on May 19, 1966, 254 F.

Supp. 306 (A. 107), the railroads, including the CNW, wrote the unions' general chairmen suggesting conferences in accordance with the court's decision (A. 21, 98-99, 107), and the National Mediation Board, on June 2, 1966, urged the parties to hold such conferences promptly (A. 21). In response to the urging of the National Mediation Board and the suggestion of the railroads, the general chairmen of the union did meet and confer with the management of the CNW in June and August of 1966, but the parties were unable to reconcile their differences with respect to procedural handling of the dispute (A. 33, 107).

On October 4, 1966, the National Mediation Board terminated its jurisdiction of the disputes between the Union and the Atlantic Coast Line R. Co., the Boston & Maine R. Co. and Des Moines Union R. Co. (A. 24-25) and on November 1, 1966, those railroads filed *Atlantic Coast Line R. Co., et al. v. Brotherhood of Railroad Trainmen,* 262 F. Supp. 177 (D. D. C. 1966), asserting in part that the BRT had not fulfilled the requirements of the Railway Labor Act, by refusing to handle the several disputes with the several railroads on a national basis (A. 25).

During the period from the initiation of the *Atlantic Coast Line* suit on November 1, 1966, until after both the *Akron & Barberton Belt* and the *Atlantic Coast Line* litigation had been completed—when this Court denied Petitions for Writ of Certiorari in both cases in January, 1968 (390 U. S. 923 and 389 U. S. 1047)—no further efforts were made by the CNW or the union's general chairmen representing its employees in any of its several districts with respect to settlement of the "crew consist" dispute, no meetings or conferences were held, and the National Mediation Board, which had assumed jurisdiction over the CNW crew consist dispute, held the matter in abeyance (A. 33-35, 107-108).

Subsequent to March 19, 1968 the parties conferred with respect to the dispute on five occasions in May, June, July and August, 1968 (A. 37, 110-114).

The parties further conferred with respect to the dispute on four occasions in April and May, 1969 (A. 26, 37, 40-42, 79-80, 102, 116-117, 120-123, 153-154, 166; Tr. 340-344, 371-372).

Commencing June 2, 1969 the National Mediation Board, through one of its veteran mediators, Arthur Glover, undertook actively to mediate the dispute between the parties and met with the parties on ten occasions until July 2, 1969, during which mediation sessions the parties exchanged and discussed written proposals by each of them (A. 44-47, 124-130, 197; Defendant's Ex. 6; Plaintiff's Ex. 16, 17, 18; Tr. 284-285, 338).

On July 2, 1969, Mediator Glover advised the parties that he was going to report to the National Mediation Board that mediation had failed (A. 47). On October 16, 1969, after rejection of the National Mediation Board's proffer of arbitration, the National Mediation Board terminated its jurisdiction of the dispute, advising the parties that:

> "[i]t is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement."

(Defendant's Ex. 7, A. 198-199, Tr. 433).

After the NMB terminated its jurisdiction of the dispute, the parties engaged in further negotiations with respect to elimination and restoration of particular jobs, for seven full days, commencing on November 12, 1969, but no agreement was reached (A. 142-144).

On November 19, 1969, the CNW commenced this action for a declaratory judgment that the Union had not ex-

hausted the requirements of the Railway Labor Act and for an injunction against a strike by the Union on the ground that the union had not fulfilled the requirements of Section 2, First of the RLA requiring parties to make "every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions" by:

> "First: Having insisted in the foregoing dispute upon bargaining separately with the plaintiff carrier instead of bargaining jointly with all the railroads upon which the BRT had served like notices, nevertheless
>
> (a) The defendant has refused to bargain on the proposals in the carrier's counter-notices to reduce the size of main line road crews;
>
> (b) The defendant has insisted that any agreement on the C&NW be no more favorable to the C&NW than agreements reached on the other railroads upon which the BRT served like notices;
>
> (c) The defendant has entered negotiations with a fixed position and a determination not to deviate from the position regardless of what relevant consideration might be advanced by the C&NW; and
>
> Second: Notwithstanding the foregoing, the defendant has refused to engage in national handling of this dispute and to negotiate on a joint basis a national crew consist agreement with all the railroads on which the BRT served like notices" (Complaint, A. 5, 7).

SUMMARY OF THE ARGUMENT

Under the scheme provided by the Railway Labor Act for the voluntary resolution of major disputes with respect to making and changing collective agreements, for avoiding the exercise of self-help by parties to such dis-

putes by requiring the status quo to be maintained after notice, during conferences by the parties, during and after compulsory mediation or voluntary arbitration and, in some cases, during and after an investigation and Report to the President with respect to the dispute, the court below correctly held, in accordance with the decisions of this Court, that Section 2, First of the Act, providing that it shall be the duty of carriers and their employees to make every reasonable effort to make agreements, is not justiciable.

The court below also correctly ruled that the National Mediation Board, as the representative of the public in such disputes, rather than the courts, is the agency which the Act provides to assure compliance by the parties with Section 2, First in the exhaustion of the procedures of the Act, through the exercise of its power to prevent self-help and to require the status quo to be maintained for an almost interminable time and to recommend intervention by the President in the dispute by an investigation and Report by a Presidential Emergency Board.

The court below also correctly rejected petitioner's contention that Section 2, First of the Railway Labor Act is justiciable and correctly disagreed with the opinion of the Court of Appeals for the Fourth Circuit in Piedmont Airlines v. Air Line Pilots Ass'n., 416 F. 2d 633 (1969), which would, in effect, incorporate into the Railway Labor Act, through Section 2, First, provisions of the Labor Management Relations Act, for the National Labor Relations Board to obtain an injunction requiring a union to maintain the status quo and prohibiting a strike by the union pending a determination by the Board, upon evidence of the bargaining conduct of the parties, whether the union was guilty of the unfair labor practice of refusal to bargain in good faith and, depending upon such determination, to permit the union to strike or obtain an

injunction against a strike by the union until it should purge itself of the unfair labor practice. Such a procedure, if tacked onto the existing Railway Labor Act, would empower the courts to remand the parties to some point in the existing procedures of the Railway Labor Act and require re-negotiation or re-mediation until the court should be satisfied, upon evidence of the bargaining conduct of the parties, that there had been compliance with Section 2, First of the Railway Labor Act in the re-exhaustion of the procedures provided by the Act and whether the union then legally could strike.

Tacking such a judicial proceeding onto the exhaustion of the existing procedures of the Railway Labor Act and thus making the exercise of self-help dependent upon the result of such a judicial proceeding, was not contemplated by Congress in the enactment of the Railway Labor Act and, necessarily, would frustrate and probably supplant the existing scheme and provisions of the Act for the voluntary resolution of disputes.

Petitioner's argument that Section 2, First of the Railway Labor Act is justiciable is based upon a *misconception* of decisions of this Court and of statements in opinions of this Court and upon *obiter dictum* and *mistaken assumptions* by lower courts, which should be rejected, and the decision of the court below affirmed.

ARGUMENT

I

The Court Below Correctly Decided That Section 2, First of the Railway Labor Act Is Not Justiciable.

Circuit Judge Kerner speaking for the Court below (A. 222; 422 F. 2d at 985) construed Section 2, First of the Railway Labor Act, 45 U. S. C. 152, First, as not judicially enforceable because:

> "To imply judicial enforcement to § 2, First, would insert a judicial inquiry into every step of the Railway Labor procedures to determine in each case if reasonable effort is being exerted; this is a role which we believe Congress did not intend the courts play in the settlement of Railway disputes."

That conclusion is fully supported by the prior decisions of this Court and particularly by *General Committee of Adjustment v. Missouri-Kansas-Texas R. Co.*, upon which the Court below relied (A. 222-223; 422 F. 2d at 985-986).

What is now Section 2, First of the Railway Labor Act has been so construed by this Court since it first appeared in railway labor legislation as Section 301 of Title III of the Transportation Act of 1920 which appears at page 1 of Appendix A to this Brief (Br. App. A, p. A-1).

Notwithstanding Section 301 of Title III of the Transportation Act of 1920 was couched in mandatory terms that "it shall be the duty of all carriers and their officers, employees and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier" and to consider and if possible decide all disputes in conference, this court said in *Pennsylvania Railroad System and Allied Lines Federa-*

tion No. 90, et al. v. Pennsylvania Railroad Co., 267 U. S. 203 at 210 and 215-216 (1925):

> "It is clear from this language that in the *Labor Board Case* this Court has decided that there is nothing compulsory in the provisions of the statute as against either the Company or the employees upon the basis of which either acquired additional rights against the other which can be enforced in a court of law. The language of the Title is a legal definition of the jurisdiction and duty of the Railroad Labor Board in attempting to settle the controversies between the railroad employer and its employees, and where the Labor Board exceeds its jurisdiction and violates the provisions describing its functions, it may be subject to judicial restraint at the complaint of any properly interested party. *The so-called mandatory language of Section 301 might, if that section were accompanied by a penalty for its violation or some other means of compulsion, . . . be given the force of a statutory obligation* of the parties to a dispute . . . But when the other sections of the Title are taken as a whole, they may be searched through in vain to find any indication in the mind of Congress or any intimation that the disputants in the controversies to be anticipated were in any way to be forced into compliance with the statute or with the judgments pronounced by the Labor Board, except through the effect of adverse public opinion" (emphasis supplied).

Section 2, First of the Railway Labor Act of 1926 has remained unchanged to date (Br. App. A, p. A-2) to provide:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning

rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

When Section 2, First of the Railway Labor Act was first considered by this Court in *Texas & New Orleans R. Co. v. Brotherhood of Ry. & Steamship Clerks*, 281 U. S. 548 at 567 (1930), this Court treated it as not justiciable but enforced Section 2, Third of the Railway Labor Act of 1926 prohibiting railroad interference, influence or coercion in the designation of its employees of a representative.

"It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings. The question before us is whether a legal obligation of this sort is also to be found in the provisions of subdivision third of Section 2 of the Act providing that "Representatives for the purposes of this Act, shall be designated by the respective parties . . . without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

"It is at once to be observed that *Congress was not content with the general declaration* [stated in Section 2, First of the Railway Labor Act of 1926] *of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements* concerning rates of pay, rules and working conditions, and to settle disputes with all expedition

in conference between authorized representatives, but added this distinct prohibition against coercive measures. This addition can not be treated as superfluous or insignificant, or as intended to be without effect. *While an affirmative declaration of duty contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded.* The intent of Congress is clear with respect to the sort of conduct that is prohibited . . ." (emphasis supplied).

The quoted statement of this Court denies any validity to the argument by petitioner (Br. 34) that the *Texas & New Orleans* case is relevant here because it emphasizes the shift to a statute declaring judicially enforceable obligations; the only "shift" which occurred was in sections other than Section 2, First.

Moreover, the Senate Report with respect to the Bill which became the Railway Labor Act of 1926 makes it clear that the Act was not toward a compulsory system but instead was to establish a voluntary system for the resolution of disputes. The choice was deliberate, for as the Senate Report states:

"The question was consequently presented whether the substitute should consist of a compulsory system with adequate means provided for its enforcement, or whether it was in the public interest to create the machinery for amicable adjustment of labor disputes agreed upon by the parties and to the success of which both parties were committed.

Manifestly, it is unwise to commingle the two. One plan or the other should be adopted.

The committee is of opinion that it is in the public interest to permit a fair trial of the method of ami-

> cable adjustment agreed upon by the parties, rather than to attempt under existing conditions to use the entire power of the Government to deal with these labor disputes. If the plan proposed by the parties does not work, it will then be proper to consider what other methods are essential to protect the public interest in adequate and uninterrupted transportation." *S. Rep. No. 222 to accompany S. 2306, To Provide for the Prompt Disposition of Disputes Between Carriers and their Employees, Committee on Interstate Commerce, 69th Cong., 1st Sess., p. 3 (1926).*

This understanding of the effect of the Act was similarly articulated by Donald Richberg at Part 2, page 182 of the Hearings conducted by the Senate Committee on Interstate Commerce, 69th Congress, First Session, where he said: "I believe . . . that the most dangerous provision you can write into this law is any provision for compulsory investigation at any stage of the proceedings."

Petitioner's reliance (Br. 36-37) upon statements by Donald Richberg in the hearings conducted by the Congressional Committees which considered the Bills which became the Railway Labor Act of 1926 do not support petitioner's contention that Section 2, First, was intended to be justiciable. Instead, Mr. Richberg's conception of the extent to which Section 2, First, might be judicially enforceable was only to compel a railroad to deal with the representative freely selected by its employees; such concept was enacted as Section 2, Ninth, in the 1934 Amendments of the 1926 Railway Labor Act (Br. App. A. p. A-5). *See* Appendix B (p. A-16) to this Brief setting out Mr. Richberg's complete statements; the portion omitted by petitioner appears in italics.

Circuit Judge Kerner correctly rejected the railroad's great reliance upon this Court's decision in *Virginia Ry.*

Co. v. System Federation, No. 40, 300 U. S. 515 (A. 227, 228; 422 F. 2d at 988):

"The Railway places great reliance that §2, First, is justiciable upon the Supreme Court's decision in *Virginia Ry. v. System Federation*, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789 (1937). In *Virginia Ry.*, the railroad had refused to engage in collective bargaining with the Federation after the National Mediation Board, acting under §2, Ninth, of the Railway Act, determined and certified the Federation to be the representative of the shop craft employees for collective bargaining with the railroad. The Supreme Court upheld a district court injunction which required the railroad to recognize and bargain with the Federation despite the railroad's argument that §2, Ninth, was not justiciable. While the injunction also required the railroad to make every reasonable effort to settle disputes with the Federation thus in fact invoking the dictates of §2, First, the opinion did not state nor imply that whether reasonable effort is in fact complied with by either party was a question for the courts to answer. The Supreme Court did not suggest that the district court retain jurisdiction to determine if the parties were negotiating in good faith, nor did it suggest a further judicial proceeding if conferences between the railway company and the Federation failed. Thus while *Virginia Ry.* holds that §2, Ninth, contemplates judicial enforcement of the requirement to bargain with the Board's accredited employee representative, it does not hold that judicial enforcement is available to determine whether the parties are in fact negotiating in good faith. As we read *Virginia Ry.*, it allows for judicial enforcement of the specific dictates of §2, Ninth, and simply provides that when the carrier and the employees' representatives

are negotiating they should be guided by the other provisions of the Railway Labor Act including §2, First."

Thus the Court below treated the failure of conferences not to raise a justiciable question of compliance with Section 2, First, the same as this Court did in the *Virginian* case. In *Virginian* this Court, 300 U. S. at 551-552, stated that if conferences failed, the dispute should be advanced to mediation by the NMB, which this Court said, in *Missouri-Kansas-Texas*, 320 U. S. at 337, "is the antithesis of justiciability." The Court of Appeals for the District of Columbia Circuit took the same view of the course of a major dispute in the event of a failure of negotiations. In *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.*, 385 F. 2d 581 (1967), *cert. den.*, 390 U. S. 923 (1968) the Court of Appeals, in reversing a decision of the District Court that the notices involved in this case did not become effective until the expiration of the Award of Arbitration Board 282 after which full fledged conferences, which had not been held were required prior to mediation, said, 385 F. 2d at 597:

> "In the case before us the carriers flatly refused to engage in any statutory bargaining whatever prior to the expiration date. Except in the case of objectionable union proposals discussed below, the carriers before us must be held to have breached their statutory duty under the Railway Labor Act to confer and bargain on the merits or proposed changes in work rules. The decree of the District Court embodies a contrary declaration, and to that extent it is reversed.
>
> "We now consider the effect of our reversal of the District Court's ruling that the notices were not effective to require negotiation until after termination of the Award. As we have seen, conferences are but the first step in the chain of Railway Labor Act procedures. *Once they have been frustrated, one side to*

> ***the dispute can move to the next*** **tier or procedures, and indeed in at least one series of cases involving parties before us the National Mediation Board has accepted jurisdiction of the controversy. The carriers have forsaken their right to insist on conferences by their refusal to respect effective Section 6 notices....'' (Emphasis supplied).**

Petitioner's treatment of the statement in the *Virginian* case as "dictum" (Br. pp. 57-58) is without substance. To so construe the *Missouri-Kansas-Texas* case and in the other two cases decided the same day, *General Committee of Adjustment v. Southern Pacific R. Co.*, and *Switchmen's Union of North America v. National Mediation Board, infra*, would be to completely ignore the comprehensive analysis of the legislative history of the 1926 Act and the 1934 Amendments to that Act, and the limitations stated by this Court in those cases with respect to what disputes are justiciable.

This Court considered Section 2, First of the Railway Labor Act and its prior decisions in the *Pennsylvania R. Co.* cases, *supra*, the *Texas & New Orleans* case and the *Virginian Railway* case in three cases which were decided November 22, 1943 and in which it delimited the original general jurisdiction of the Courts with respect to disputes arising under the Railway Labor Act; *General Committee of Adjustment v. Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *General Committee of Adjustment v. Southern Pacific R. Co.*, 320 U. S. 338 and *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297.

In those three cases this Court held that only certain disputes were justiciable under the provisions of the Railway Labor Act, notwithstanding the apparent general original jurisdiction of federal district courts of *all* suits and proceedings arising under any law regulating commerce

(*Switchmen's Union* case, 320 U. S. at 300) and to render declaratory judgments in such actions (*Missouri-Kansas-Texas* case, 320 U. S. at 327-328; *Southern Pacific* case, 320 U. S. at 339, 343-344).

In the *Missouri-Kansas-Texas* case, this Court, after reviewing the history of the Railway Labor legislation and its prior decisions in the *Pennsylvania* cases, the *Texas & New Orleans* case and the *Virginian* case, said, 320 U. S. at 337:

> "... the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudictory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect those arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability.
>
> "In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. . . . Courts should not rush in where Congress has not chosen to tread.
>
> "We are here concerned solely with legal rights under this federal Act which are enforcible by courts. For unless such a right is found it is apparent that this is not a suit or proceeding 'arising under any law regulating commerce' over which the District Court had original jurisdiction. . . ."

Earlier in its opinion in the *Missouri-Kansas-Texas* case this Court said that it was Section 2, Ninth, of the Railway Labor Act, as amended in 1934, which was enforced in the *Virginian* case, rather than Section 2, First of the Railway Labor Act of 1926 (320 U. S. at 330-331). Also, earlier in its opinion in the *Missouri-Kansas-Texas* case, this Court again considered Section 2, First and its opinion in the *Virginian* case and expressly denied that Section 2, First, was justiciable, saying, 320 U. S. at 333-334:

> "The Engineers assert that the carriers had no right under the Act to negotiate with the Firemen on the subject of emergency engineers and that the Mediation Agreement of December 12, 1940, is therefore void. They rely on § 2, Fourth, of the Act and on § 2, First and Ninth. Section 2, Fourth states that 'Employees shall have the right to organize and bargain collectively through representatives of their own choosing'. But that great right, which Congress in 1926 at last supported with legal sanctions, is not challenged here. The Engineers and the Firemen are the collective bargaining agents for their respective crafts and are acknowledged as such. Their authority so to act is not challenged. Nor is it apparent how the majority rule provision of § 2, Fourth, is involved here. It states that 'The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.' But concededly the Engineers represent a majority of the craft of engineers and the Firemen a majority of the firemen's craft. The principle of majority representation is not challenged. *Nor does § 2, Second, make justiciable what otherwise is not.* It provides that 'All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition; in conference between represent-

atives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute'. *As we have already pointed out, § 2, Ninth, after providing for a certification by the Mediation Board of the particular craft or class representative, states that 'the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act'. That command of § 2, Ninth, was enforced in the Virginian R. Co. case. But § 2, Second, like § 2, First,* [which provides that 'It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.''] *merely states the policy which those other provisions buttress with more particularized commands''* (emphasis supplied).

Petitioner plainly misrepresents the language of this Court in *Elgin, Joliet & Eastern R. Co. v. Burley,* 325 U. S. 711 at 721, fn. 12 and 729, in fn. 26 (Br. 52-53, 58) as construing the *Virginian* case to hold Section 2, First to be justiciable and thus as a departure from its opinion two years previously in the *Missouri-Kansas-Texas* case, that Section 2, First is not justiciable. Neither can petitioner's argument, that in *Burley,* this Court construed the *Virginian* case differently than it had in the *Missouri-Kansas-Texas* case, and thus, that Section 2, First is justiciable under *Virginian* and *Burley,* rather than non-justiciable as under *Missouri-Kansas-Texas,* be reconciled with the statement in the text of the opinion in *Burley* (325 U. S. at 724-5) that the ". . . Compulsions [of the Railway Labor Act with respect to major disputes] go only to

insure that those procedures [of the Act for conference and negotiation, and mediation and, if mediation fails, then to acceptance or rejection of arbitration and, finally, to possible presidential intervention] are exhausted before resort can be had to self-help."

In *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co.*, 372 U. S. 284 (1963) this Court considered an earlier stage of this dispute. In that case the unions sought an injunction against self-help by the railroads on the ground the railroads' action would abolish crew-consist rules in violation of Section 2, First of the Railway Labor Act which requires railroads and their employees to make every reasonable effort to make and maintain agreements establishing rules. In that case petitioner here took a position, based on the *Missouri-Kansas-Texas* case, directly contrary to its position in this case. On page 22 of its Brief in the Court of Appeals in the *Baltimore & Ohio* case it stated:

> "The only provisions of the Railway Labor Act cited in the organizations' brief which have any materiality in this dispute are Sections 2, First and Seventh (45 USC 152, First and Seventh) and Section 6 (45 USC 156). Section 2, First provides that
>
> > "'*It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions*, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.'
>
> "This section is a preliminary statement of the purpose and policy of the provisions of the Railway

Labor Act which follow. In *General Committee of Adjustment of the Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Company*, 320 U. S. 323 (1943) the Supreme Court said:

> "'Nor does § 2, Second make justiciable what otherwise is not . . . But § 2, Second, like § 2, First, merely states the policy which those other provisions buttress with more particularized commands'."

This Court did not comment on the railroads' argument that Section 2, First was not justiciable when it decided *Brotherhood of Locomotive Engineers, et al. v. Baltimore & Ohio R. Co., et al.*, 372 U. S. 284 (1963), but said, *per curiam*, at 290-291:

> "The only question presented, therefore, is whether the record before us sustains the finding of both lower courts that the parties have exhausted the procedures provided by the Railway Labor Act for major disputes such as that in Elgin, J. & E. Ry. Co. v. Burley, 325 U. S. 711, 725.
>
> '. . . [t]he parties are required to submit to the successive procedures designed to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration.'
>
> • • • • • • • •
>
> ". . . both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute, subject only to the invocation of the provisions of § 10 providing for the creation of an Emergency Board. . . ."

The Court adhered to that view in *Brotherhood of Railway & Steamship Clerks, etc., v. Florida East Coast Ry. Co.*, 384 U. S. 238 (1966), saying at 244:

> ". . . The unions, having made their demands and having exhausted all the procedures provided by Congress, were therefore warranted in striking. For the strike has been the ultimate sanction of the union, compulsory arbitration not being provided.
>
> "At that juncture self-help was also available to the carrier as we held in Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co., 372 U. S. 284, 291. . . . '• • • both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute • • •.' . . ."

and this Court has continued to adhere to the rule announced in the *Baltimore & Ohio* and *Florida East Coast* cases in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369 (1969), and in *Detroit & Toledo Shore Line R. Co. v. United Transportation Union*, 396 U. S. 142 (1969).

II

The Scheme and Provisions of the Railway Labor Act for the Resolution of Major Disputes Would Be Frustrated or Rendered Completely Ineffective by Tacking Onto Them Judicial Review of Whether a Party to Such a Dispute Has Complied With Section 2, First of the Act and, if Not, a Judicial Determination of What Such Party Must Do in Order to Comply.

The notion that Section 2, First of the Railway Labor Act confers jurisdiction upon courts to determine whether a party, in exhausting the requirements of the Act, made every reasonable effort, as contemplated by Section 2, First, to resolve the dispute, so far as we have found,

had its origin in *American Air Lines, Inc. v. Airline Pilots Ass'n.*, 169 F. Supp. 777 (D. C. S. D. N. Y. 1958). In that case, after the requirements of the Act, including an investigation and a report to the President by an Emergency Board, had been exhausted and the status quo periods had expired, the Airline sought an injunction against a strike by the Pilots, contending (169 F. Supp. at 780) as the CNW contends in this case, that the union had "refused to bargain in good faith" subsequent to the Report of the Emergency Board; the union contended, it had, in fact, exhausted the procedures of the Act in good faith and was legally entitled to strike.

The District Court stated that the case was not one in which the union had refused to bargain at all and there was no doubt that the union at least had gone through the procedural steps contemplated by the Act up to the time of the Report of the Emergency Board. However, the Court, upon the basis of the language of this Court in *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U. S. 711, fn. 12, where this Court said that "good faith exhaustion of the possibility of agreement . . .", is required to comply with the provisions of the Railway Labor Act, took evidence to determine the union's good faith. Finding no helpful cases under the Railway Labor Act dealing with the standards to be applied in resolving the question of the union's good faith, which the Court said was one of subjective intent to be determined from the facts and circumstances, the District Court turned to Section 8 of the Labor Management Relations Act and cases arising thereunder for the standards for determining whether the requirements of good faith bargaining had been fulfilled by the union, 169 F. Supp. at 793-794. Applying the test to the evidence with respect to the conduct of the parties, the Court concluded the union had met the test of good faith negotiations and denied the Airlines' contention that the parties should be remanded to the

point at which the Presidential Emergency Board made its report and to engage in further negotiations and denied a preliminary injunction against a strike by the pilots.

It is apparent that the District Court in the *American Airlines* case misconstrued the language in the *Burley* case with respect to Section 2, First of the Railway Labor Act being justiciable as is shown under Point I, *supra.*

Piedmont Aviation, Inc. v. Airline Pilots Ass'n., 416 F. 2d 633 (4th Cir., 1969), is the most recent case to give expression to the view of the District Court in the *American Airlines* case, that the conduct of parties in exhausting the requirements of the Railway Labor Act is thereafter subject to judicial review and a judicial determination of whether such party has the right to exercise self-help.

The facts in *Piedmont,* as appear from the Findings of Fact, Conclusions of Law and Order of the United States District Court for the District of Columbia entered August 1, 1967 in *Ruby, etc., et al. v. Piedmont Aviation, Inc.*, Civil action No. 1820-69 (Br. App. C, p. A-25), and from *Piedmont Aviation, Inc. v. Airline Pilots Ass'n.*, 71 LRRM 3216 (D. C. M. D. N. Car. 1969), and from the opinion of the Court of Appeals for the 4th Circuit in *Piedmont Aviation, Inc. v. Airline Pilots Ass'n.*, 419 F. 2d 636, on appeal from a preliminary injunction granted by the District Court for the Middle District of North Carolina were as follows: In 1965 Piedmont ordered twelve Boeing 737 airplanes which it intended to commence operating July 1, 1968. In 1966, the Air Line Pilots Ass'n., hereinafter ALPA, adopted a mandatory policy that no less than three men would be employed in crews operating Boeing 737 aircraft regardless of whether the Federal Aviation Administration might certify the aircraft for operation by less than three. On August 28, 1967 ALPA proposed, under Section 6 of the Railway Labor Act, an agreement

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for a minimum crew of three persons to be employed on the airplanes. Piedmont counter-proposed for a crew of only two. The dispute was not resolved in extensive negotiations between the parties commencing in November 1967 and extending through May 8, 1969 during which time the National Mediation Board twice undertook to mediate the dispute and also a question arose with respect to the interpretation of an interim agreement which ALPA contended resolved the dispute.

On August 5, 1969 Piedmont instituted an action in the United States District Court for the Middle District of North Carolina for an injunction against a strike by ALPA apparently on the ground ALPA, in its negotiation and in mediation, had adamantly insisted upon a three man crew because its Constitution and By-laws prohibited it from agreeing to less than a crew of three and notwithstanding the Federal Aviation Administration had certified the 737 could safely be operated with a crew of two. On August 14, 1969 the District Court in North Carolina entered a preliminary injunction against a strike by ALPA.

Upon ALPA's appeal from the preliminary injunction which did not raise the issue of the justiciability of Section 2, First, the Court of Appeals directed the District Court to determine whether the dispute was a "major" or "minor" dispute (416 F. 2d at 639-640). If the District Court found the dispute to be "major" the Court of Appeals said with respect thereto (416 F. 2d 637):

> ". . . The district judge found that at numerous meetings the company sought to bargain with the union over the crew complement, but he described the union as having a 'mandatory policy' on this issue. He concluded that this raised questions of law and fact justifying a temporary injunction pending trial of the case. We construe these findings and con-

clusions as a ruling that the union failed to negotiate in good faith as required by the Railway Labor Act.

* * * * * * *

"On the record before us we cannot say that the district judge's findings are clearly erroneous or that he abused his discretion in granting a temporary injunction. Piedmont introduced evidence that the union would not bargain for a crew of less than three men because its bylaw forbade bargaining over that subject. The bylaw does not in itself prove lack of good faith bargaining. Chicago, R. I. & P. Ry. v. Switchmen's Union, 292 F. 2d 61, 67 (2d Cir. 1961), cert. denied, 370 U. S. 936, 82 S. Ct. 1578, 8 L. Ed. 2d 806 (1962). But use of the bylaw as a reason for refusal to bargain on the issue of crew complement, in the face of the Federal Aviation Administration's certification of the B-737 for two-man crews, is not consistent with the Railway Labor Act's provisions requiring the parties 'to exert every reasonable effort to make and maintain agreements concerning * * * working conditions, and to settle all disputes * * * in order to avoid any interruption of commerce.' 45 U. S. C., § 152, First. See Elgin, J. & E. Ry. v. Burley, 325 U. S. 711, 721 n. 12; American Airlines, Inc. v. Air Line Pilots Ass'n. Int'l., 169 F. Supp. 777, 793 (S. D. N. Y. 1958).

"*At the trial on the merits for a permanent injunction the details of each bargaining session will be more fully developed by examination and cross-examination of the participants.* From this the district judge will be in a position to make more definite findings of the historical facts. Consequently, what we have said is not intended to anticipate the outcome of the hearing for a permanent injunction. If that trial fails to establish lack of good faith bargaining, the injunction against the strike should be dissolved. Implicit in

the Railway Labor Act is the right of employees to strike over a major dispute after the proceedings required by the Act have been exhausted. Brotherhood of R. R. Trainmen v. Jacksonville Terminal Co., 394 U. S. 369, 378, 89 S. Ct. 1109, 22 L. Ed. 2d 344 (1969). *And even if the trial discloses a lack of good faith bargaining, the injunction must not be a permanent bar to the strike. Provision should be made for its dissolution, whether or not agreement is reached, when the union complies with the Act. The union—no less than the company—has the right to resort to self-help when proceedings under the Act have been exhausted.*" (Emphasis supplied.)

The consequence and effect of the order of the Court of Appeals in the *Piedmont* case, if the District Court should find the dispute was a major dispute with respect to which the requirements of the Railway Labor Act admittedly had been exhausted, would be for the District Court then to determine, upon evidence of "the details of each bargaining session" between Piedmont and ALPA, commencing with the first one in November 1967 and in each such session thereafter, including those conducted by the National Mediation Board and thereafter, whether ALPA had done what the Court should consider ALPA should have done to make "every reasonable effort" to resolve the dispute in accordance with Section 2, First of the Railway Labor Act. Thus, depending upon what the Court should find from the evidence, it would permit ALPA to strike or it would remand the parties to some point in the dispute, which apparently could be to a pre-mediation point (in the American Airlines case the Airline sought remand only to the date of the report of the Presidential Emergency Board) and to require the parties to re-negotiate, re-invoke the jurisdiction of the National Mediation Board and re-mediate (assuming the courts have the power to require re-mediation), and thereafter determine,

upon evidence of what the parties had done in renegotiation and re-mediation, whether ALPA had "made every reasonable effort" in accordance with Section 2, First to resolve the dispute so as to be entitled to strike, or should require the redoing of some requirement of the Railway Labor Act.

The Railway Labor Act contains no provision for the proceeding directed by the Court of Appeals for the Fourth Circuit in *Piedmont;* however, such a proceeding is contemplated by Sections 8 and 10 of the Labor Management Relations Act (29 U. S. C., §§ 158, 160; Br. App. A, pp. A-10-15; *See* discussion and cases cited, 22nd Annual Report, National Labor Relations Board, 1957, pp. 115-116; 31st Annual Report, National Labor Relations Board, 1966, pp. 151-153; 32nd Annual Report, National Labor Relations Board, 1967, pp. 175-180, 183-185; 33rd Annual Report, National Labor Relations Board, 1968, pp. 165-168), which expressly do not apply to parties subject to the Railway Labor Act, 29 U. S. C., §§ 152(2), 152(3) (Br. App. A, pp. 9-10). It is thus apparent that the Court of Appeals for the Fourth Circuit would incorporate into Section 2, First of the Railway Labor Act the provisions of Sections 8 and 10 of the Labor Management Relations Act. It is thus clear that in the *Piedmont* case, the Court of Appeals for the Fourth Circuit disregarded what this Court said, in *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.,* 353 U. S. 30 at 31, fn. 2, that "[t]he relationship of labor and management in the railroad industry had developed on a pattern different from other industries" and that "[t]he fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis for the National Labor Relations Act. . . ", and also disregarded a similar admonition by this Court in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U. S. 369 at 383-4 (1969), ". . . that the National Labor Relations

Act cannot be imported wholesale into the railway labor arena" and that "[e]ven rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes."

In this case the CNW seeks the same result as was contemplated by the Court in *Piedmont*. It is best illustrated by Petitioner's claim that the union has not exhausted the requirements of the Railway Labor Act in compliance with Section 2, First because it refused to handle the crew consist dispute arising from the notices served in June and July 1965 by the union's several general chairmen upon the CNW and other railroads concurrently and in conjunction with the dispute arising from the notices served in December 1965 by the CNW and other railroads on the union's general chairmen through a single committee representing the union's general chairmen with the National Railway Labor Conference representing all the railroads on a national basis. This claim was asserted by Petitioner notwithstanding the decision in *Atlantic Coast Line v. Brotherhood of Railroad Trainmen*, 383 F. 2d 225 (D. C. Cir. 1967), *cert. denied*, 389 U. S. 1047 (1968), that the union had not breached any duty under the Railway Labor Act by refusing to agree to such national handling. The railroad's contention in this case, as explained by its Vice-President, is that the decision in the *Atlantic Coast Line* case was based upon evidence offered by the union that crew-consist disputes properly could not be resolved by a national agreement but only on the basis of local conditions, but that, in dealing with the railroads individually, the union had in fact negotiated individual agreements amounting to a national agreement which it was attempting to force on the CNW and thus had not made the "every reasonable effort" required by Section 2, First of the Railway Labor Act to make an agreement with the CNW on the basis of the position it took in the *Atlantic Coast Line* case (A. 68-78).

And the CNW further stated its position that the Court should hold all of the 100-120 crew-consist agreements made by individual railroads with the union's general chairmen to have been unlawfully made and to remand the railroads and the union to where they were with respect to the dispute at the expiration of the Award of Arbitration Board 282 in January 1966 for the dispute to be rehandled on a national basis through the procedures of the Railway Labor Act—negotiation and mediation (A. 102, 182-183).

Under *Piedmont* and the contention of the CNW, the District Court would be required to take evidence with respect to the conduct of the parties in *each* of the negotiation and mediation sessions in which the parties participated, as outlined in the statement in this Brief, in order to determine whether there had been compliance with Section 2, First and what further should be done by the parties—if anything.

The annual reports of the National Mediation Board for 1960 through 1969 disclose that the Board terminated its jurisdiction of 369 major disputes, 139 of those disputes during the fiscal year ending June 30, 1969 (Br. App. D, p. A-32). Thus, if the view of the Court of Appeals for the Fourth Circuit in *Piedmont* should be made applicable to the Railway Labor Act, it necessarily could result in the District Courts of the United States being required *ex post facto*, to participate in the negotiations and mediation of major disputes. This has not heretofore been considered by this Court to be the role of the judiciary and would require the Courts to do so, as was observed by Judge Friendly speaking for the Court of Appeals for the Second Circuit in *Chicago, R. I. & P. R. Co. v. Switchmen's Union of North America*, 292 F. 2d 61 (1961) at 67, ". . . without the advance administrative screening provided under the National Labor Relations

Act . . .". This judicial inquiry would be outside the "detailed framework" of the Railway Labor Act for the settlement of major disputes stated by this Court in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal,* 394 U. S. 369 at 378-381:

> "Nowhere does the text of the Railway Labor Act specify what is to take place once these procedures have been exhausted without yielding resolution of the dispute. Implicit in the statutory scheme, however, is the ultimate right of the disputants to resort to self-help—'the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.' Florida E. C. R. Co. v. Brotherhood of Railroad Trainmen, 5 Cir., 336 F. 2d 172, 181 (1964). We have consistently so held in a long line of decisions.
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> "Both before and after enactment of the Railway Labor Act, as well as during congressional debates on the bill itself, proposals were advanced for replacing this final resort to economic warfare with compulsory arbitration and antistrike laws. But although Congress and the Executive have taken emergency *ad hoc* measures to compel the resolution of particular controversies, no such general provisions have ever been enacted. And for the settlement of major disputes,
>
> > " 'the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No

authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration.' Elgin, J. & E. R. Co. v. Burley, *supra*, at 725, 65 S. Ct., at 1291.

"We have not previously had occasion to consider whether the Railway Labor Act circumscribes state power to regulate economic warfare between disputants subject to the Act.

* * * * * * * *

". . . We think it clear, however, that the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes. The disputants' positions in the course of negotiation and mediation, and their willingness to submit to binding arbitration or abide by the recommendations of a presidential commission, would be seriously affected by the knowledge that after these procedures were exhausted a State would say, prohibit the employees from striking or prevent the railroad from taking measures necessary to continue operating in the face of a strike. Such interference would be compounded if the disputants were—as they frequently would be—subjected to various and divergent state laws. . . ."

Certainly the positions of parties to a major dispute in the course of negotiations and mediation, their willingness to submit to arbitration or abide by the recommendations of a Presidential Emergency Board and voluntarily to resolve the dispute would be seriously affected by the knowledge that if, after the procedures of the Railway Labor Act were exhausted, they would, nevertheless, be subject to a judicial proceeding with respect to whether, in the exhaustion of those procedures, they had made "every reasonable effort" to resolve the dispute as contemplated by Section 2, First of the Railway Labor Act and the attend-

ant delay and uncertainty with respect to the result of such judicial procedure and the right to the exercise of economic self-help.

Obviously the adoption of such a rule would be to increase the number of major disputes which, although having run the gamut of the Railway Labor Act procedures, would permit one of the parties to seek a judicial forum to prolong the dispute pending judicial determination whether there had been compliance with Section 2, First. Such a rule of law would tip the scales in favor of the railroad because of its economic interest in delaying the implementation of the union demands. It might be that in some small number of cases it would be in the interest of the union to delay self-help by the railroad; however, the union would find it difficult, if not impossible, to obtain a finding by a district court that the injury which would be suffered by it would be irreparable.

Moreover, in cases in which non-compliance with Section 2, First should be found, the district court then must, under *Piedmont*, as under Sections 8 and 10 of the Labor Management Relations Act, provide a means for determining compliance and for the dissolution of an anti-strike injunction upon a judicial determination that Section 2, First has been complied with. The district courts of the United States are peculiarly ill fitted for such continuing superintendence of labor disputes. This would be particularly true where proposals of the parties are for changes in a great number of complicated rules embodied in existing agreements or for the addition of many such complex rules with respect to which the district courts would be required to take evidence as to the bargaining conduct of the parties.[1] For example, the Presidential Railroad

[1] "In the railroad and airline industries, the importance of these conferences for full consideration of the proposals cannot be overemphasized. This is particularly true when the proposals involve

Commission required hearings occupying ninety-six days, resulting in a transcript of over 15,000 pages and exhibits of over 20,000 additional pages, and a period of approximately twenty months to complete its fact-finding function and a total of two years to complete its report as to the proposals of the parties in their 1959 and 1960 notices, of which this crew-consist dispute was only one. Presidential Railroad Commission Report of February 28, 1962, pp. 29-33. *See also International Association of Machinists, etc. v. National Mediation Board*, 425 F. 2d 527 at 530-531, 532 (D. C. Cir. 1970). Moreover, unlike the National Labor Relations Board, the decisions of the district courts necessarily would result in a non-uniform duty being applied.

Surely the Railway Labor Act does not contemplate such judicial proceedings and they should not be tacked onto the requirements of the Act by incorporating into Section 2, First of the Railway Labor Act the provisions of the Labor Management Relations Act for the determination and the prevention of "unfair labor practices".

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change of complex rules, or entire revision of agreement. In the latter case the employment contract may contain as many as 100 provisions or rules, dealing with rates of pay, hours of service, and the many and varied conditions affecting working assignments. A proposed change of a single rule often develops numerous issues between the parties. The necessity of exhaustive efforts by the parties themselves in direct negotiations to settle, if possible, all disputes or reduce to a minimum the differences or issues, is essential where the proposals involve contemplated changes in a great number of working rules, otherwise the succeeding procedural methods of mediation, arbitration or emergency board proceedings are handicapped by the necessity to consider voluminous and detailed testimony, exhibits and other evidence pro and con with relation to costs, administration problems, etc., involved in the proposals. The agreements and the individual rules are deeply rooted in tradition and meaning, having been developed over many years to their present-day form and status through the processes of collective bargaining, mediation proceedings, arbitration and adjustment board awards, and emergency board recommendations." *Administration of the Railway Labor Act by the National Mediation Board 1934-1970*, pp. 27-28.

In the other cases cited by petitioner in support of its argument that Section 2, First is justiciable, the statements in the opinions relied upon by petitioner were *dictum* or the Court took evidence of the conduct of the parties and determined the question upon the *assumption* that Section 2, First is justiciable, as appears from the analysis of most of these cases in Respondent's Brief in Opposition with which we shall not further burden this Brief; in the additional cases now cited by Petitioner, the question of justiciability of Section 2, First was neither raised nor decided.

III

The National Mediation Board, Not the Courts, Is the Agency Provided by the Railway Labor Act With "Jurisdiction" to Assure Compliance With Section 2, First and to Determine Whether and When Parties to a Major Dispute Have Exhausted the Procedures of the Railway Labor Act and May, Subject to Emergency Board Procedures, Exercise Economic Self-Help.

The exercise of economic self-help is the ultimate method authorized by the Railway Labor Act for the resolution of major disputes. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Company*, 394 U. S. 369, 378-379 (1969). The same is true with respect to such disputes arising under the Labor Management Relations Act, 29 U. S. C. 163.

It is the purpose of both the Railway Labor Act and the Labor Management Relations Act to provide for the resolution of management-labor disputes by agreements reached through collective bargaining prior to the exercise of self-help, 45 U. S. C. 151 (a) and 29 U. S. C. 141, 151 (Br. App. A, pp. A-1-2, 6-9). The Labor Management Relations Act provides for the prevention of the exercise of self-help by a party to a labor dispute without such party having bargained with the other in good faith by empowering the National Labor Relations Board to ob-

tain injunctions against the exercise of self-help by a party which is alleged not to have bargained in good faith, 29 U. S. C. 159 (a) (5) and (b) (3); 160 (e), (j) and (k) (Br. App. A, pp. A-10-15); *See also American Airlines, Inc. v. Air Line Pilots Ass'n.*, 169 F. Supp. 777 at 793-796 and cases cited therein, which was misapplied to the Railway Labor Act as heretofore shown, and *National Labor Relations Board v. American International Insurance Company*, 343 U. S. 395 (1952).

But the Labor Management Relations Act provides only for the exercise of self-help to be denied the parties to a dispute subject to that Act only until after conferences, which are but the first step of the procedures of the Railway Labor Act. There is no provision in the Labor Management Relations Act for the exercise of self-help to be deferred subsequent to conferences, as there is in the Railway Labor Act for the denial of self-help during compulsory mediation and thereafter, in some cases, during and after an investigation and Report to the President by an Emergency Board.

In *Detroit & Toledo Shore Line R. Co. v. United Transportation Union*, 392 U. S. 142, this Court stated the interrelationship of the status quo provisions of the Railway Labor Act and the provisions of Section 2, First of the Railway Labor Act imposing upon parties to such a dispute the duty "to make every reasonable effort" to settle the dispute. In that case this Court (396 U. S. at 148-152) reviewed the purpose of the Railway Labor Act and its provisions for the non-compulsory settlement of major disputes involving the formation and changing of collective agreements and said:

> ". . . It imposed upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted. . . . *A final and crucial aspect of*

the Act was the power given to the parties and to representatives of the public [the National Mediation Board] *to make the exhaustion of the Act's remedies an almost interminable process.* As we noted in Brotherhood of Railway & Steamship Clerks, etc. v. Florida E. C. R. Co., 384 U. S. 238, 246 (1966), 'the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute'.

"The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout. Moreover, since disputes usually arise when one party wants to change the status quo without undue delay, the power which the Act gives the other party to preserve the status quo for a prolonged period will frequently make it worthwhile for the moving party to compromise with the interests of the other side and thus reach agreement without interruption to commerce.

"There are three status quo provisions in the Act, each covering a different stage of the major dispute settlement procedures. . . . These provisions must be read in conjunction with the implicit status quo requirement in the obligation imposed upon both parties by § 2 First, 'to make every reasonable effort' to settle disputes without interruption to interstate commerce.

"While the quoted language of [the status quo provision], §§ 5, 6 and 10 is not identical in each case,

> we believe that these provisions, together with § 2 First, form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the final 30-day 'cooling-off' period. . . ." (emphasis supplied).

Thus, under the Railway Labor Act the National Mediation Board has authority to do more than the National Labor Relations Board to accomplish compliance with Section 2, First of the Railroad Labor Act and for the resolution of disputes by agreement. Under the Railway Labor Act the National Mediation Board may prevent the exercise of self-help by requiring the status quo to be maintained for an "almost interminable" period of time, until the National Mediation Board is satisfied, based on its intimate relationship with the parties to the dispute, and until it determines, as it customarily does and as it did in this case, that:

> "It is the judgment of [the] Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement" (A. 199).

Petitioner's contention (Br. p. 71) that respondent is required to demonstrate that the National Mediation Board has an adjudicatory responsibility, such as that of a Court, to enforce Section 2, First of the Railway Labor Act, is without merit. As demonstrated in Point I of this Brief, Section 2, First is not justiciable and petitioner's contention assumes the question presented in this case; petitioner also simplistically conceives that every duty expressed in the Railway Labor Act must be considered as administratively or judicially enforceable, notwithstanding the contrary decisions of this Court heretofore discussed.

Petitioner asserts (Br. 44-47) that the "cooling off" or status quo periods, following the termination of mediation or a Report by a Presidential Emergency Board, are the

periods during which the necessity is most pressing for insuring compliance with Section 2, First through a judicial proceeding during which the exercise of self-help is postponed and made dependent upon the result of such judicial proceeding. This assertion presupposes that the provisions of the Act for mediation and for the marshaling of public opinion as a result of a Report by a Presidential Emergency Board are and will be totally ineffective; but, if that is so, then the remedy is for Congress, by amendment of the Railway Labor Act and not for the Courts, to tack such a judicial proceeding onto the existing procedures of the Act and to make the exercise of self-help dependent upon the result of such a judicial proceeding.

This Court has repeatedly held, as the Court of Appeals for the Fourth Circuit in the *Piedmont* case recognized, that the exercise of economic self-help is the ultimate means for resolving railway labor disputes, regardless of whether such self-help becomes available by the termination of the jurisdiction of the National Mediation Board of a dispute or after an investigation and report by a Presidential Emergency Board or as a result of a judicial determination that the provisions of the Act for resolving the dispute by agreement have been exhausted.

The Court below correctly treated the authority of the National Mediation Board to induce and assure compliance with Section 2, First as the method provided by the Railway Labor Act in preference to judicial intervention, as stated by Judge Kerner for the Court below (A. 225-226; 422 F. 2d 987):

> "Instead of involving the federal courts in the determination of whether a reasonable effort had been exercised, after all the procedures of the Act have been completed, it seems much more efficient and sensible to allow the Mediation Board while the Act's procedures are being carried out to determine if a

reasonable effort is being exercised by the parties. To allow the Mediation Board rather than the courts to perform this function removes the courts from having to issue injunctions in labor disputes (because § 2, First, had not been complied with), thus avoiding conflict with the dictates and policy of the Norris-LaGuardia Act. In addition, a judicial enforcement of § 2, First, would also require the federal courts to remand the dispute back to a certain stage in the procedures of the Act where one party was not bargaining in good faith. We find no machinery nor guidelines in the Act which would aid the court in making this difficult determination."

CONCLUSION

The decision of the court below is in accordance with decisions of this Court, is based on the accepted view of the scheme and procedures of the Railway Labor Act, and correctly rejected Petitioner's argument which is based upon a misconception of decisions of this Court and of statements in opinions of this Court and upon *obiter dictum* and mistaken assumptions by lower courts.

For the foregoing reasons, the decisions of the courts below dismissing the complaint should be affirmed.

Respectfully submitted

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APPENDIX

APPENDIX A

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TRANSPORTATION ACT OF 1920, ch. 91, Tit. III, 41 Stat. 456.

Section 301.

"It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute."

RAILWAY LABOR ACT OF 1926, ch. 347, 44 Stat. 577.

Section 1 (now 45 U. S. C. 151a).

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to

provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Section 2, First (now 45 U. S. C. 152, First).

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Second.

"All disputes between a carrier and its employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carriers and by the employees thereof interested in the dispute."

Section 2, Third.

"Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

Section 5.

"First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Board of Mediation created by this Act, or the Board of Mediation may proffer its services, in any of the following cases:

(a) A dispute arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions not adjusted by the parties in conference and not decided by the appropriate adjustment board;

(b) A dispute which is not settled in conference between the parties, in respect to changes in rates of pay, rules, or working conditions; . . ."

RAILWAY LABOR ACT OF 1934, ch. 691, 48 Stat. 1185, 45 U. S. C. 152

Section 2, First (now 45 U. S. C. 152, First).

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Second.

"All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

Section 2, Third.

"Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Section 2, Fourth.

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other

contributions: *Provided,* That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 2, Ninth.

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee

of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Section 5, First (now 45 U. S. C. 155, First).

"Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time. . . ."

NATIONAL LABOR RELATIONS ACT OF 1935, ch. 372, 49 Stat. 449.

Section 1 (now 29 U. S. C. 151).

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) im-

pairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect

of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

LABOR MANAGEMENT RELATIONS ACT OF 1947, ch. 120, 61 Stat. 136, **amending** the Labor Management Relations Act of 1935, 49 Stat. 449, now 29 U. S. C.

Section 141.

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Section 152(2).

"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

Section 152(3).

"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not ob-

tained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

Section 158(a)(5).

"It shall be an unfair labor practice for an employer— . . .

to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

Section 158(b)(3).

"It shall be an unfair labor practice for a labor organization or its agents— . . .

to refuse to bargain collectively with an employer provided it is the representative of his employees subject to the provisions of section 159(a) of this title;"

Section 158(d).

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract in-

corporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

Section 160 (b)

"Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such

charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28."

Section 160(e)

"The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to

be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is materal and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to

the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."

Section 160 (j)

"The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."

Section 160 (k)

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

APPENDIX B

Statements made by Donald Richberg in **Hearings on H. R. 7180 before the House Committee on Interstate and Foreign Commerce**, 69th Cong., 1st Sess. (1926).

Mr. Richberg's complete statements were as follows; the portion omitted by petitioner at pp. 36-37 of its brief appears in italics:

> Mr. Fredericks. Now does this law up to the time where the mediation board is provided for require the doing of anything which you could not do without it?
>
> Mr. Richberg. Require otherwise?
>
> Mr. Fredericks. Yes.
>
> Mr. Richberg. I think it does; in other words, it requires both parties to make every reasonable effort to make and maintain agreements. It makes that a legal duty upon them.
>
> Mr. Fredericks. How is that enforced?
>
> Mr. Richberg. Well, that is a different question.
>
> Mr. Fredericks. I know it is. I am asking you as a different question.
>
> Mr. Richberg. Well, when you say to require—I do not want to say that it compels in the sense of putting a legal force on them. We have avoided in the bill in any way setting up any penalty sections or any sections for the invocation of any judicial authority, except in the enforcement of an arbitration award. The thought being this, that so far as this law stated duties imposed upon the parties by act of Congress, if they failed to live up to their duties, and there was any action which a court could take consistent with the judicial powers and its limitations, to compel the enforcement of that duty as a legal obligation, it would be subject to enforcement. But the law for such enforcement or compulsion should be developed in the

courts, according to the old common law theory of letting the courts develop the law after the obligations are clearly understood, rather than to write into the law a specific line of penalties and writs of enforcement.

Now there are certain limitations upon what I have said, because how far the court, for example, can compel the parties to exert every reasonable effort, what that means, may be a question. But when the transportation act was under consideration by the Supreme Court the Supreme Court said that very clearly there was no purpose by Congress in passing that act to have the labor board's orders enforced by judicial order.

What we have sought here is not to enforce the orders of any Government tribunal, but to provide a basis upon which it may be possible to enforce legal obligations written by Congress. Now that would present a different question in a judicial proceeding. For example, it may well be that an effort on the part of any group of men or either party, representing either employer or employees, to set up barriers to the free operation of this law, would be in violation of the law, and it would be possible to obtain judicial power to enforce that.

Mr. Fredericks. How?

Mr. Richberg. It depends upon the particular manner in which the law might be violated.

Mr. Fredericks. Well, can you suggest a violation and a remedy?

Mr. Richberg. I can think, for example of this situation. Suppose under the third paragraph of section 2 which provides that representatives shall be designated by the parties in such manner as may be provided, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other, there

should be any effort to influence or control the selection of representatives. I think under those circumstances that any effort on the part of either the employer or the employee to control the operations of the organization of the other, to influence or control the selection of representatives, would amount to either an individual action or a combination of actions —I do not like the word "conspiracy," but let us say for a moment "conspiracy"—to violate this law, and the courts have found remedies for enjoining concerted action and even individual action to violate the law.

Mr. Fredericks. It is rather negative? All of that is negative, is it not?

Mr. Richberg. That is negative; yes. Of course, the theory all through this law has been that we were not seeking, as I said in the beginning, the force of government.

* * * * * * *

Mr. Fredericks. Now let me ask you a general question. In the matters of railroad labor disputes which have occurred in the past few decades there has arisen a volume of law and decision, some statutory and some decision. Now I am asking this as a very general question; you may not be able to answer it, and you may—does this bill set aside or nullify any of that structure of law?

Mr. Richberg. That is a broad question, but I say in all sincerity, to the best of my knowledge, and I have studied this very intensively, I do not believe that there is any provision of either statutory law or law written in the courts which this bill nullifies in any way. Now, I am quite sure that it does not in any way disturb the general law regarding industrial relations, let us say. I am sure that it has no effect upon what I referred to previously as the development of the law of conspiracy in the courts, with which I am not

wholly in sympathy, but I will say that I do not think that this bill affects it.

As to any law of Congress, as to any statute, any Federal statute, it repeals the Newlands Act and substitutes the same sort of mediation proceedings. So that it can not be said to really affect that law, except to strengthen and improve it.

It repeals, of course, Title III of the transportation act, but Title III of the transportation act has been, by the decisions of the courts, construed to amount to very little more than an expression of public opinion and an attempt to invoke public opinion. There is very little legal force in the transportation act. So you can not say that any substantive law, other than Title III of the transportation act, is written out of the law by the passage of this bill.

So that I believe I am quite safe in saying that it does not alter either the statute law or the law as written in the courts in any way that is not perfectly apparent upon the face of it as I have indicated. (House Hearings, pp. 40-42.)

• • • • • • • •

Mr. Mapes. Suppose that Congress should enact this bill into the law, and there should be no agreement entered into at all by the employees and the management, what parts of the law would be enforceable?

Mr. Richberg. In the first place, I think if either party showed a willful disregard of the fundamental requirements, that they should make every reasonable effort to make an agreement—in other words, if they refuse absolutely to confer, to meet or discuss or negotiate, I think there is a question as to whether there might not be invoked some judicial compulsion, but I would rather see that left to development rather than see it written into the law. But outside of that, if the parties do not make an agreement, I think you

face this question, first, as to whether the Government board of mediation could bring them to see the error of their ways; and, second, if that effort was unsuccessful, whether they could bring them to refer that dispute to an arbitration, and then if it was of sufficient magnitude so that it actually affected commerce substantially, whether the emergency board could not itself bring about an adjustment.

I do not believe—I may be unduly optimistic, but I hardly believe that many railroads, if any, and I do not believe that any organizations at all, could probably resist the pressure provided in this law upon them to really exert every reasonable effort to make an agreement, and in view of the fact that this is not a new field it ought not to be very hard to write agreements. In other words, this is not as though we were opening up an entire new field in industry.

Agreements between railroads and their organizations have been in existence for long periods of time. The general terms of such agreements are all worked out. They exist to-day covering the great majority of the employees on the railroads. They exist on either all the railroads or on a great proportion of the railroads, so that it is not as though you were suggesting opening up an entire new field. It is not a very difficult situation to get down to what are any differences between parties as to the type of agreement which should be written. There are too many agreements now.

Mr. Mapes. That is my understanding, but I was rather anxious to have your statement of just what would be the effect if they did not agree. Without any agreement it seems to me, from reading the bill, the emergency board provisions would be in effect. Am I right in that?

Mr. Richberg. Yes; first, the board of mediation provisions, and then the emergency board in the last

analysis, if they attempted a test of economic strength, so called.

Mr. Mapes. There is no doubt in your mind but what those two provisions would be in operation regardless of whether the parties could agree or not?

Mr. Richberg. Quite regardless; yes; very clearly, because before the emergency board is the board of mediation in its jurisdiction. It is given jurisdiction not merely of a dispute over grievances, not merely of a dispute regarding changes in rates of pay or rules, but also of any other dispute which is not decided in conference, and it was the intention of all the parties to give complete jurisdiction over all disputes. Id. 66-67.

• • • • • • • •

Mr. Huddleston. Now, referring to section 2 on page 3, it shall be the duty of all carriers, their officers, agents, and employees, to exert every reasonable effort to make and maintain agreements," etc. Do you agree that that also is unenforceable by judicial proceeding?

Mr. Richberg. Not always. I think any action involving an arbitrary refusal to comply with that duty might be subject to judicial compulsion. I am sure it would work both ways.

Mr. Huddleston. "To exert every reasonable effort."

Mr. Richberg. In other words, I think it would not be exerting a reasonable effort to make and maintain agreements, for a carrier of its appropriate officers to refuse to even meet a committee that sought to make an agreement.

Mr. Huddleston. That is substantially the same provision as is carried by section 301 of the Esch-Cummins Act.

Mr. Richberg. I would like to question, whether that can be called substantially the same, Mr. Huddleston,

for this reason: The Esch-Cummins Act—that is, the transportation act—provides it shall be the duty of the carriers and employees to exert every reasonable effort to avoid any interruption to the operation of the carrier. Now, that is exactly what we have tried to change here. In other words, that means it is their duty to do anything that they think is wise to preserve the services from being interrupted.

Mr. Huddleston. Of course, that is broader than this language. I did not refer to that aspect of it, but merely to the "duty" aspect.

Mr. Richberg. Well, with reference to the duty aspect, it was my impression that if anything in this transportation act was enforceable, it might be that duty, but in the cases in which an effort was made to get a court, to get the judicial power behind the act, in which I participated more or less, it seemed that that question was always lost in the question that the court discussed and finally decided as to whether the orders of the labor board were enforceable, and I do not think we have gotten a clear-cut decision as to whether, for example, a combination of either carriers or employees to violate that duty was not a violation of law. I do not think we ever had that decision.

Mr. Huddleston. That is just the point I was coming to. I wanted to ask you what the courts have held with reference to that clause of the transportation act.

Mr. Richberg. I do not think it has ever been squarely met and answered, because I have participated in practically all the cases involved in this transportation act in one form or another, and in one case I, in fact, did not go through it to the final participation in the Supreme Court, just because of the fact that I did not believe we were going to get a decision that would give us light on that question. I

do not think the courts have held, even under the transportation act, that when Congress imposes the duty in the interests of the public that a party can go out and arbitrarily violate that duty just because Congress does not always fix a penalty of fine or imprisonment. I do not think that is the law.

Mr. Huddleston. I have held as to the Esch-Cummins Act the same opinion as you now express, but I was under the impression, not having kept up with the decisions, that the courts had held that section 301 could not be enforced by injunction or other court proceeding.

Mr. Richberg. I will give you an example, Mr. Huddleston, in the Pennsylvania clerks' and shopmen's cases, which went to the Supreme Court of the United States. Now there was very earnest effort made in behalf of those organizations in those cases to get the court to pass on the question as to whether a duty was not imposed on a common carrier under the law which it had to fulfill, but as a matter of fact the presentation from the standpoint of the carrier was to the effect that the Labor Board had issued an order which they had refused to comply with, and the decision of the court went off on the basis that any order of the Labor Board, whether interlocutory or final, was not compulsory, and, therefore, they would not enforce it, and I do not believe that the decision in that case or any other case has passed on the question that I think is presented by your statement, and I think is presented again in this law, as to whether, if Congress imposes the duty—and particularly, let me say, on a public service corporation—whether that duty can be deliberately and willfully violated without permitting a court to interfere and check such a violation of law.

Mr. Huddleston. You think, then, that this section is enforceable?

Mr. Richberg. I think that a duty imposed by law is enforceable by judicial power, yes. Of course, this is not a duty which could be enforced in a very absolute way, because it is a duty to exert every reasonable effort. In other words, all that could be enforced by the court would be an order against an arbitrary refusal to even attempt to comply with that duty, but I believe that could be subject to judicial power. Id. 84-85.

APPENDIX C

United States District Court
For the District of Columbia

Charles H. Ruby, as President of the Air Line Pilots Association, International and the Air Line Pilots Association, International, an Unincorporated Association, Plaintiffs, v. Piedmont Aviation, Inc., Defendant.	Civil Action. No. 1820-69.

Findings of Fact, Conclusions of Law and Order

(Filed August 1, 1969)

This cause came on to be heard upon plaintiff's motion for a preliminary injunction on July 16, 1969. The Court having considered the pleadings and all other documents filed herein, and having heard argument of counsel for both parties, makes the following

Findings of Fact

1. Plaintiff Air Line Pilots Association, International ("ALPA") is an unincorporated association organized for the purposes and objectives of a labor organization. ALPA is a "representative" as defined in Section 1, Sixth, of the Railway Labor Act (the "Act"), 45 U. S. C., § 151, Sixth, and is the duly recognized and authorized exclusive col-

lective bargaining agent for the air line pilots employed by defendant.

2. Defendant Piedmont Aviation, Inc. ("Piedmont" or "defendant"), is a common carrier by air engaged in interstate commerce within the meaning of Section 201 of the Act, 45 U. S. C., § 181, and is subject to the provisions of the Act.

3. Collective bargaining between the Association and the defendant is subject to the requirements of the applicable provisions of the Railway Labor Act.

4. Prior to 1967, the defendant purchased twelve Boeing 737 twin turbojet aircraft which ultimately were scheduled to be placed in service by the defendant, beginning July 1, 1968.

5. Following oral discussion by the parties on August 28, 1967, the Association, on October 16, 1967, opened bargaining for a crew complement on the Boeing 737's by submitting to the defendant a proposal calling for a minimum crew of three, including a pilot, co-pilot and observer pilot. Thereafter, the defendant counterproposed a two-man crew complement for the Boeing 737's, consisting of a pilot and co-pilot.

6. During the months of November, December 1967 and January, February 1968, the parties met extensively in collective bargaining but without resolving the dispute over the crew complement for Boeing 737's. On March 1, 1968 the Association applied for intervention by the National Mediation Board. Thereafter the parties met in mediation under Section 5, First, of the Railway Labor Act, 45 U. S. C., § 195, on numerous occasions in the months of May, June and July 1968, but still without resolving the crew complement issue. On such matter, Piedmont pro-

posed a two pilot crew complement and ALPA proposed a three pilot crew complement.

7. On July 24, 1968 ALPA and Piedmont entered into a collective bargaining agreement and a letter of agreement governing operation by Piedmont's pilots of B-737 turbojet aircraft. Said letter of agreement provided:

"This Letter of Agreement is made and entered into in accordance with the provisions of the Railway Labor Act, as amended, by and between Piedmont Aviation, Inc. (hereinafter known as the 'Company') and the Air Line Pilots in the service of Piedmont Aviation, Inc., as represented by the Air Line Pilots Association, International (hereinafter known as the 'Association').

"*Witnesseth*:

"It is hereby agreed that the following rates of pay for operation of B-737 equipment will apply:

"Rates for 3-man operation effective 7/1/68 for 80 hours:

Captain	— $2463
Copilot	— 1600
Second Officer	— 500

"Computed as follows:

Hourly	— Day—11.87 Nite—14.37
Gross Weight	— 100,000 lbs.
Mileage	— 460 MPH

"Rates for 2-man operation (80 hours) effective 1/1/69 based on the assumption that United procedures or arbitration results in a decision for a 2-man operation:

Captain	— $2763
Copilot	— 1800

"All provisions of the Agreement effective July 1, 1968 not specifically changed or amended by this Letter of Agreement shall remain in full force and effect.

"This Letter of Agreement shall become effective July 1, 1968 and shall remain in full force and effect concurrently with the Pilot Employment Agreement effective July 1, 1968, except that:

"In the event the United arbitration or procedures result in a decision for a 3-man operation, the parties agree to reopen negotiation under the provisions of the Railway Labor Act for 3-man operations and rates of pay beginning January 1, 1969.

"In Witness Whereof the parties hereto have signed this Letter of Agreement, this 24th day of July, 1968."

8. The reference to "United arbitration or procedures" in the B-737 agreement was to evaluation and other proceedings being conducted pursuant to an agreement between ALPA and United Airlines Inc. on B-737 crew complement. Because of delay in final United-ALPA proceedings, Piedmont and ALPA, by letters dated December 20 and December 27, 1968, extended the January 1, 1969 date of their agreement to coincide with the date for implementation of the Special Review Board decision on United. This exchange of letters did not change the terms of the Piedmont-ALPA agreement dated July 24, 1968, except for the January 1, 1969 date.

9. On February 22, 1969, the United-ALPA Special Review Board issued its final report and recommendations. Said Special Review Board found that the Boeing 737 should be manned by a three pilot crew for the duration of the existing United-ALPA collective bargaining agreement, stating:

"The B-737 airplane in regular United Air Lines operations should be manned by a three-man crew for

the duration of the present basic agreement between the parties."

10. By letter dated February 27, 1969, ALPA advised Piedmont of its intention to reopen negotiations under the provisions of the Act and in accordance with the B-737 letter of agreement dated July 24, 1968. Negotiations were conducted on March 18, 1969, following which the dispute was docketed by the National Mediation Board under Section 5, First, of the Act as Case No. A-8572. Mediation was conducted in a session held May 5-8, 1969. The Boeing 737 crew complement issue has never been settled.

11. It is ALPA's position that the Piedmont-ALPA B-737 agreement of July 24, 1968 was intended to and required Piedmont to continue operation of B-737 aircraft with a three pilot crew in the event of a decision for a three pilot crew on United. ALPA further maintains that the issue of a two or three pilot crew complement has accordingly been resolved by the United-ALPA Special Review Board decision for a three pilot crew, and that the only issues properly open for negotiation and mediation between the parties in Case No. A-8572 were rates of pay and duties for three pilot crew operations. ALPA asserts that it maintained such position in negotiations and mediation in Case No. A-8572.

12. It is Piedmont's position that the July 24, 1968 B-737 agreement did not require Piedmont to continue with a three pilot crew in the event of such decision in United-ALPA proceedings, but required only that Piedmont and ALPA reopen negotiations on crew complement and rates of pay if the United-ALPA Special Review Board held for a three pilot crew. Piedmont asserts it maintained such position in negotiations and mediation in Case No. A-8572.

13. By letter dated June 6, 1969, the National Mediation Board advised the parties that its mediation efforts had

been unsuccessful in Case No. A-8572 and proffered arbitration in accordance with Section 5, First, of the Act. Piedmont, by letter of June 9, 1969, declined said request to submit the pending dispute to arbitration. By letter dated June 13, 1969, the National Mediation Board advised the parties that its services in Case No. A-8572 were terminated under Section 5, First, of the Act.

14. On June 9, 1969, ALPA applied to the National Mediation Board, pursuant to Section 5, Second, of the Act, for an interpretation of the July 24, 1968 agreement, reached in mediation under the provisions of the Act. Said application for an interpretation is presently before the Board for consideration.

15. On June 16, 1969, Piedmont notified ALPA of its intention to remove the second officer (third pilot) from Piedmont Boeing 737 aircraft effective July 16, 1969. This date was by stipulation of the parties herein changed to July 21, 1969. ALPA commenced the present action on June 30, 1969, seeking a preliminary injunction restraining Piedmont from removing the second officer from B-737 aircraft pending a final determination of this action.

Conclusions of Law

1. This action arises under the Railway Labor Act, as amended, 45 U. S. C., § 151 *et seq.* This Court has jurisdiction over this action, the parties and plaintiff's motion for a preliminary injunction.

2. The parties have, under the provisions of the Railway Labor Act, engaged in good faith negotiations and mediation in Case No. A-8572, without reaching an agreement, following which the National Mediation Board has terminated its services under Section 5, First, of the Act.

3. Under the provisions of the Railway Labor Act, the parties to a labor dispute are free, following expiration

of 30 days after termination of services under Section 5, First, by the National Mediation Board, to resort to self-help by economic action of either or both parties. *Bh'd of Railroad Trainmen* v. *Jacksonville Terminal Co.*, ... U. S. ..., 89 S. Ct. 1109 (1969).

4. The Court finds that plaintiff has not shown a reasonable probability of success upon final hearing of this action.

Wherefore, It Is Hereby Ordered that plaintiff's motion for a preliminary injunction be denied.

Dated: Aug. 1, 1969

/s/ H. F. Corcoran
Judge

Docketing and Disposition of Mediation Cases

APPENDIX D

A-32

YEAR(S)	MEDIATION CASES FORMALLY DOCKETED	MEDIATION CASES DISPOSED OF*	CASES PENDING AT END OF PERIOD	CASES DISMISSED (NMB JURISDICTION TERMINATED)	SOURCE (NMB, ANNUAL REPORTS FOR FISCAL YEAR ENDING JUNE 30 OF YEAR CITED)
1935-1960	6,277	6,135	-	-	26th AR, 1960, pp. 21,76,77
1960	309	292	233	17	26th AR, 1960, pp. 21,76,77
1961	236	229	221	20	27th AR, 1961, pp. 26,80,81
1962	218	205	234	17	28th AR, 1962, pp. 21,79,80
1963	236	199	271	10	29th AR, 1963, pp. 26,79,80
1964	246	252	265	28	30th AR, 1964, pp. 23,81,82
1965	261	236	290	28	31st AR, 1965, pp. 19,69,70
1966	672	236	526	41	32nd AR, 1966, pp. 23,77,78
1967	319	242	603	15	33rd AR, 1967, pp. 30,89,90
1968	245	284	550	54	34th AR, 1968, pp. 17,72,73
1969	251	343	458	139	35th AR, 1969, pp. 18, 76-77
1935-1969 +	8,761	8,375		-	35th AR, 1969, pp. 18,76,77
1960-1969	2,484	2,240		389	

* Includes Mediation Agreement, withdrawal before & after mediation, refusal to arbitrate by one or both parties and dismissal by the National Mediation Board.

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1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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---

REPLY BRIEF FOR THE PETITIONER

While we have little to add to our opening brief respecting respondent's arguments, the quite different contentions now advanced by the AFL-CIO as *amicus curiae* require further elaboration of our views. Accordingly, in this reply we first comment briefly upon respondent's analysis and then show that the position

taken by the *amicus,* which is foreign both to the position taken throughout this litigation by the respondent and to the rationale adopted by the lower court, is without merit.

1. *The positions of the parties.* In view of the marked differences between the approach of the respondent and that of the *amicus curiae,* we start by outlining the positions of the respective parties.

No one denies that, for purposes of the issue presented here, it must be assumed *arguendo* that the union violated Section 2 First of the Railway Labor Act. Where that is so—where, for example, the union simply refuses to engage in any discussion of the issues, believing that a strike will so cripple the carrier that unconditional surrender will be the result—it is our view that judicial relief is available to the carrier, because the Congress intended by Section 2 First to impose a legally enforceable obligation "to exert every reasonable effort" to negotiate an agreement. Moreover, we urge that the Norris-LaGuardia Act does not place strike injunctions outside the scope of available relief, because the Congress did not intend Norris-LaGuardia to touch situations in which a party has transgressed the Railway Labor Act (Br. 24-25).

Respondent, on the other hand, denies that the Congress intended Section 2 First to be judicially enforceable under any circumstances. No matter how palpable the violation and how destructive the consequences, in respondent's view the courts are powerless to intervene at any stage with any form of relief. But respondent evidently does not disagree with our view respecting the reach of Norris-LaGuardia, a statute that is not once even cited by respondent. Thus

the parties to this litigation—both members of what the *amicus* refers to in often-cited terms as a " 'state within a state . . . [having] its own customs and its own vocabulary' " (Br. p. 1)—apparently agree that this case turns upon the question whether the Congress intended violations of Section 2 First to be justiciable *at all.*

The *amicus,* in contrast, evidently is not prepared to maintain that a claim of a violation of Section 2 First is not justiciable, but argues instead that strike injunctions are foreclosed by Norris-LaGuardia. To be sure, the *amicus* says that it "agree[s] fully with" respondent's contentions and that it is simply "assum[ing] *arguendo*" that they are wrong (Br. pp. 3-4 & n.1). But the force of that commitment to respondent's position is undermined by the *amicus'* view of *Virginian,* which corresponds with ours:

> "That assumption [that the courts can enforce the duty to bargain in good faith] does entail the conclusion that some form of injunctive relief is available to require a party, which has failed to meet this obligation, to negotiate properly. *That is the lesson of Virginian Ry.* v. *Systems Federation,* 300 U.S. 515, 544-550 (1937), *where this Court held that a refusal to treat could be remedied by an order requiring 'the employer to meet and confer . . . to listen to* [*his employees*] *complaints, to make reasonable effort to compose differences . . .'* " (Br. p. 4) (emphasis supplied).

2. *The arguments of respondent.* For the most part, we rely upon our opening brief with respect to respondent's arguments. We add only the following observations:

a. As to the legislative history of Section 2 First, respondent speaks hardly at all. Respondent simply

declares that "Mr. Richberg's conception of the extent to which Section 2, First, might be judicially enforceable was only to compel a railroad to deal with the representative freely selected by its employees" (Br. p. 16).[1] But respondent does not point to any language to support this notion that Mr. Richberg thought Section 2 First would be enforceable only against carriers, and neither the testimony reproduced in our brief (pp. 35-38) nor that in respondent's brief will bear such a restrictive reading. Accordingly, there is no basis whatever for ascribing to the Congress an intent that an obligation in terms applicable to both parties should in fact bind only one.[1a] As this Court has repeatedly declared, the obligations imposed by the Act are mutual and the "Act's command [is] that *employees as well as railroads* exert every reasonable effort to settle all disputes." *Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330, 339 (1960). See also, *e.g.*, *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 721 n. 12 (1945); *Detroit & T.S.L. R.R.* v. *United Transportation Union*, 396 U.S. 142, 151 (1969); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 758 (1961).

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[1] Respondent's attempt to explain away Mr. Richberg's remarks cannot in any event support its main argument that Section 2 first is not justiciable at all.

[1a] The *amicus* takes a different approach to this legislative history. The *amicus* does not deny that it discloses an intent that Section 2 First be enforced, if necessary, by the courts. But the *amicus* says, as we understand it (Br. pp. 17-18), that the debates do not reflect explicitly an intent that the provision be enforced by strike injunctions. But of course in 1926, prior to enactment of the Norris-LaGuardia Act, there was no occasion for the legislators or witnesses to discriminate among various types of enforcement. If a provision of this sort was enforceable, then in an appropriate case a strike injunction would have been available.

b. As to this Court's prior opinions, we merely sketch our approach and identify the fundamental flaw of respondent's. Broadly stated, our view of this Court's decisions is as follows: (1) The principles this Court applied in *Pennsylvania R.R. System Federation* v. *Pennsylvania R.R.*, 267 U.S. 203 (1925), in holding Section 301 of the Transportation Act of 1920 unenforceable were held inapplicable to the Railway Labor Act in *Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks*, 281 U.S. 548 (1930). (2) The *Texas & N.O.* view that the Railway Labor Act imposed certain enforceable obligations led in *Virginian* to a holding that Section 2 First is enforceable. (3) That holding was not overturned by *General Committee* v. *Missouri-K.-T. R.R.*, 320 U.S. 323 (1943), which simply held that the Congress in Section 2 Ninth had evinced an intent that representational disputes not be dealt with by the courts and that the more general terms of Section 2 First do not override the more specific legislative plan for this special sort of problem. And (4) all subsequent expressions by this Court, including in particular the very explicit statement respecting Section 2 First's requirement of "[g]ood faith," "not merely perfunctory," "exhaustion of the possibility of agreement" in *Elgin, J. & E. R.R.* v. *Burley*, 325 U.S. 711, 721-722 n. 12 (1945), confirm our reading of *Virginian* and its continued vitality.

The basic error in respondent's analysis of this Court's decisions is respondent's view—a view not anchored in anything in this Court's opinion in *Virginian*—that *Virginian* did not hold Section 2 First judicially enforceable (Br. pp. 16-18, 22). Having eliminated from consideration the principal relevant decision, respondent relies mainly upon the old *Penn-*

sylvania R.R. System Federation decision and *Missouri-K.-T. R.R.*, and asserts in substance that this Court could not have meant what it said in *Burley* (Br. pp. 12-13, 19-22). Even without *Virginian*, respondent's analysis would be defective. The *Burley* statement cannot be ignored; *Pennsylvania* is clearly without precedential value in view of *Texas & N.O.*; and *Missouri-K.-T. R.R.* is not in point for the reasons we have already discussed. And when *Virginian* is accorded its proper place in the chain of relevant decisions, respondent's analysis collapses entirely.[2]

c. As to the lower court decisions discussed in our opening brief, respondent limits its reply to an assertion that none involved a holding respecting the justiciability of Section 2 First, together with an incorporation by reference of its Brief in Opposition (Br. p. 38). Respondent's reading of these decisions is just incorrect. Because of the significance of the long established understanding that Section 2 First is judicially enforceable, we described these lower court cases at some length (Br. pp. 61-68). Those descriptions, which identify with precision the character of the courts' treatment of Section 2 First, are in our view entirely accurate. Since respondent does not take issue with our analysis with any specificity, we are not called upon to supplement it. We note only that

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[2] In connection with the litigation that ended in *Brotherhood of Locomotive Eng'rs* v. *Baltimore & Ohio R.R.*, 372 U.S. 284 (1963), respondent notes (Br. pp. 23-24) that the railroads, in their brief to the Court of Appeals, contended that the union's claim should be denied because Section 2 First, upon which that claim was based, was not justiciable. But both the lower courts and this Court passed on the claim on the merits. Surely it is much more relevant that the non-justiciability argument was unsuccessful than that the railroads advanced it.

respondent's reliance (Br. pp. 18-19) upon *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581 (D.C. Cir. 1967), is quite inexplicable, since in that case the Court of Appeals affirmed a Section 2 First strike injunction, as we noted in our opening brief (pp. 63-64).

d. As to the role of the National Mediation Board, respondent is silent with respect to our discussion of the relevant legislative history (Br. pp. 37-42), the relevant judicial precedent (Br. pp. 71-73), and the materials disclosing the Board's own practice (Br. pp. 73-78).[3] And as to our demonstration that in crucial respects the Board would be powerless to induce good faith bargaining (Br. pp. 45-47), respondent's answer is simply that "if that is so, then the remedy is for Congress by amendment of the Railway Labor Act and not for the Courts. . . ." (Br. p. 42). But this of course misses the point. If the Congress intended Section 2 First to impose enforceable obligations, it is most improbable that it would have en-

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[3] A possible exception is respondent's observation (p. 41) that in the case at bar the letter from the Board advising the parties that it was closing its file contained the following passage:

> "It is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement" (A. 199).

But that statement accords precisely with our view of the Board's statutory responsibility. As we have pointed out, "Section 5 directs the Board to exercise *its* 'best efforts' to bring about a settlement, but does not speak in terms of the Board's compelling the parties to exercise *their* best efforts or deciding whether or not they have" (Br. p. 33). And so in the case at bar the Board terminated its services when it was satisfied, as it put it, that "all practical methods . . . for *our* adjusting the dispute have been exhausted" (emphasis supplied).

trusted enforcement to an agency that is institutionally incapable of securing full compliance.

3. *The argument of the amicus curiae.* The general features of the argument of the *amicus curiae* seem to us to be these: (a) While this Court has ruled that the Norris-LaGuardia Act does not preclude injunctions against strikes in "minor disputes," and while it may be that strike injunctions could properly issue to secure compliance with some of the "major dispute" requirements of the Railway Labor Act, this Court's decisions do not require the conclusion that Norris-LaGuardia is inapplicable where the strike injunction is sought upon the basis of a violation of Section 2 First. (b) Accordingly, as to this issue that is still open, the Court should balance the interests protected by the Railway Labor Act with those protected by the Norris-LaGuardia Act in much the fashion that this Court dealt with the issue presented last Term under the Labor Management Relations Act in *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235 (1970). And (c), the result of such a balancing of competing policy considerations, taking into account the various relevant circumstances affecting collective bargaining and the exercise of economic force through strikes, should be the affirmation of the applicability of the Norris-LaGuardia Act to strike injunction claims bottomed upon violations of Section 2 First.

As we now show, this argument is deficient in all its major elements. Whatever the relevance of the policy considerations advanced by the *amicus* in a case involving an apparent conflict between the Labor Management Relations Act and the Norris-LaGuardia Act, neither these considerations—nor opposing policy considerations—are material in a suit involving a claim

that a "major dsputes" requirement of the Railway Labor Act has been breached. While this Court has not, of course, decided the precise issue before it in this case, this is the clear teaching of its opinions dealing with the inter-relationship of the Railway Labor Act and the Norris-LaGuardia Act. Moreover, even if questions respecting the relationship between the Railway Labor Act and the Norris-LaGuardia Act were to be approached in the same fashion as the question in *Boys Markets,* the appropriate balancing of policy considerations in the case at bar should lead to the same result that was reached in *Boys Markets* —namely, that Norris-LaGuardia is inapplicable.

a. Since the *amicus* draws so heavily upon the provisions of, and the practices and decisions under, the Labor Management Relations Act, we note preliminarily our agreement with respondent (Br. p. 31) as to the validity and importance of this Court's observation that the

> ". . . National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 383 (1969) (footnote omitted).

This Court struck the same note of caution in its principal decision respecting the relationship of the Norris-LaGuardia Act to cases involving strikes in violation of the Railway Labor Act:

> "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis

of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. § 151 *et seq.* It is one of those differences which underlies the controversy in this case." *Brotherhood of R.R. Trainmen* v. *Chicago R. & I. R. R.*, 353 U.S. 30, 31 n. 2 (1957).

More particularly, a "fundamental premise and principle"—though of course not the only premise and principle—of the Railway Labor Act was to prevent strikes in this vital industry. As this Court has said, "[T]he major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks*, 281 U.S. 548, 565 (1930). "[T]he Act's primary objective" is "the prevention of strikes." *Detroit & T.S.L. R.R.* v. *United Transportation Union*, 396 U.S. 142, 154 (1969). To this end, "the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Brotherhood of Ry. Clerks* v. *Florida E.C. R.R.*, 374 U.S. 238, 246 (1966). Or, as this Court put it last Term, "A final and crucial aspect of the Act was the power given to the parties and to representatives of the public to make the exhaustion of the Act's remedies an almost interminable process." *Detroit & T.S.L. R.R.* v. *United Transportation Union*, 396 U.S., at 149 (1969). None of this, of course, can be said of the Labor Management Relations Act, which does not require "purposely long and drawn out procedures" for negotiations during which strikes are prohibited.[4]

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[4] See, *e.g.*, *NLRB* v. *Insurance Agents Int'l Union*, 361 U.S. 477 (1960); *International Union, UMW* v. *NLRB*, 257 F.2d 211, 215 (D.C.Cir. 1958); *Textile Workers Union* v. *NLRB*, 227 F.2d 409, 410 (D.C.Cir. 1955).

b. For these reasons, the Norris-LaGuardia inquiry in this case should begin with a consideration of the Congressionally intended relationship between the Norris-LaGuardia and the Railway Labor Acts, rather than with an effort to construct the sort of "rough analogies" to the Labor Management Relations Act that "must be drawn circumspectly," as this Court put it in the *Jacksonville Terminal* case, *supra*. This Court has upon a number of occasions considered that relationship. The principle established by this Court's decisions, as we said in our opening brief (pp. 24-25), is that the Norris-LaGuardia Act was not intended to apply to suits grounded upon alleged violations of the Railway Labor Act. The *amicus*, however, faults our analysis as clothed by "rhetoric" that was "carefully designed" to "allow evasion" of the Norris-LaGuardia issue—an issue raised for the first time in this litigation by the *amicus*. Accordingly, we now describe more fully the bases for our position.

The first relevant decision by this Court was *Virginian Ry.* v. *System Federation*, 300 U.S. 515, 562-563 (1937), where this Court rejected a contention that the injunctive decree against the carrier was invalid "for its failure to conform to the requirements of § 9 of the Norris-LaGuardia Act." The basis for this conclusion was the fact that the carrier had violated the Railway Labor Act:

> "It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of § 2, Ninth, of the Railway Labor Act, authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act."

Next, in *Graham* v. *Brotherhood of Locomotive Firemen,* 338 U.S. 232, 237 (1949), this Court, in upholding an injunction enforcing the Act's requirement of non-discriminatory representation by unions, rejected a Norris-LaGuardia defense on the ground that that Act "did not deprive federal courts of jurisdiction to compel compliance with positive mandates of the Railway Labor Act." This decision was followed in a similar case, *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U.S. 768, 774 (1952), where this Court held that "the District Court has jurisdiction and power to issue necessary injunctive orders" "notwithstanding the provisions of the Norris-LaGuardia Act."

It is true, as the *amicus* notes (Br. p. 18), that none of these cases dealt with an anti-strike injunction. But respondent points to nothing in the text of the statutes, in their legislative history, or in these opinions that would support the notion that some provisions of the Norris-LaGuardia Act—such as Sections 7 and 9, 29 U.S.C. §§ 107, 109, governing the procedure to be followed in issuing "labor dispute" injunctions —may be dispensed with in the interests of compelling compliance with the Railway Labor Act, but not the Section 4 ban against strike injunctions, 29 U.S.C. § 104. The rationale of these opinions is simply, as phrased in *Graham,* that Norris-LaGuardia "did not deprive federal courts of jurisdiction to compel compliance with positive mandates of the Railway Labor Act."

After *Howard,* the question of the relationship of the Norris-LaGuardia Act to the Railway Labor Act was carefully explored in a strike injunction context in *Brotherhood of R.R. Trainmen* v. *Chicago R. & I. R. R.,* 353 U.S. 30 (1957). There the Court first con-

cluded that the "minor disputes" provisions of the Railway Labor Act were intended to foreclose strikes over such disputes, though the statute did not say so explicitly. Then the Court held that in those circumstances Norris-LaGuardia did not bar an injunction. In support of that determination, the Court pointed to the legislative history of the Norris-LaGuardia Act, which reflected a recognition "that the machinery of the Railway Labor Act channeled these economic forces, in matters dealing with railway labor, into special processes intended to compromise them." *Id.* at 41. The Court also relied upon the prior decisions discussed above, describing them as cases in which "this Court has authorized the use of injunctive relief to vindicate the processes of the Railway Labor Act" and in which "the Court held that the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act." *Id.* at 41-42. And the Court regarded as "inapposite" decisions applying Norris-LaGuardia where the union's conduct was "unlawful under some other statute," since the Railway Labor Act, as well as the Norris-LaGuardia Act, was "adopted as a part of a pattern of labor legislation." *Id.* at 42.

While *Chicago River* involved a "minor dispute," the principles there applied are equally applicable to "major disputes." As this Court has declared, the legislative purpose reflected in the Railway Labor Act to ban strikes until the "major disputes" requirements of the Act are met is clear—just as clear, surely, as the purpose to ban strikes over "minor disputes." "[W]hile the [major] dispute is working its way through these stages, neither party may unilaterally alter the status quo." *Brotherhood of R.R. Trainmen*

v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969). The "immediate effect" of the "status quo requirement"—which includes "the implicit status quo requirement in the obligation imposed by § 2 First"—"is to prevent the union from striking"; this is "the Act's primary objective"-"the prevention of strikes." *Detroit & T.S.L. R.R.* v. *United Transportation Union*, 396 U.S. 142, 150, 154 (1969). And precisely the same legislative history that supported this Court's conclusion in *Chicago River* respecting the permissibility of strike injunctions designed to "vindicate the processes of the Railway Labor Act" respecting "minor disputes" supports that same conclusion respecting the "major dispute" statutory requirements. The fact of the matter is that the Congress, in enacting Norris-LaGuardia, simply did not intend to trench upon enforcement of the Railway Labor Act. That is why, for example, Congressman LaGuardia declared that the bill "in no way repeals the railroad labor act"; and that the bill would not "make it possible for lack of an injunction to tie up railroads" because "in 1926" "[w]e then passed the railroad labor act, and that takes care of the whole labor situation pertaining to the railroads," so that "[t]hey could not possibly come under this for the reason that we provided the machinery there for settling labor disputes"; and that citation of a railroad injunction case by opponents of the bill was "beside the point now, because that case would come in under the railroad labor act"; and that "the railroad workers could not and would not think of going on strike before all the remedies provided in the [Railway Labor Act] law have been exhausted"; and that "[i]f the railroads have complied, they would not, as has been suggested,

be deprived of any relief which they may have in law or equity."[5]

Because of these considerations, as we pointed out in our opening brief (pp. 24-25), the lower courts in

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[5] In fuller text, Congressman LaGuardia's remarks in the House debates on the bill were as follows:

To allay the fear of the chief opponent of the bill, Congressman Beck, Mr. LaGuardia said:

> "The bill, I will say to the gentleman from Pennsylvania, in no way repeals the railroad labor act, and three-fourths of the argument of the gentleman from Pennsylvania was directed against interference with transportation in interstate commerce; and the gentleman is a sufficiently good lawyer to know the provisions of the railroad labor act, which was passed in 1926.
>
> "Was it to create fear; was it to create prejudice? I will not charge that to the gentleman from Pennsylvania; but it was most unbecoming for a lawyer of his standing to direct his fire entirely on the interruption of transportation of interstate traffic, when there is another law which will take care of that situation.
>
> "Gentlemen, this bill does not—and I can not repeat it too many times—this bill does not prevent the court from restraining any unlawful act. This bill does prevent the Federal court from being used as an agency for strike-breaking purposes and as an employment agent for scabs to break a lawful strike. [Applause.] That is what the bill does." 75 *Cong. Rec.* 5478 (1932).

On the subject of the federal government's obtaining an injunction in the celebrated shopman's strike of 1922, Mr. LaGuardia stated:

> "But even that case is beside the point now, because that case would come in under the railroad labor act, which provides mediation and conciliation, which appoints a board of mediation, and the whole procedure of settlement of disputes is outlined in detail in that act." *Id.* at 5479.

Congressman Lankford then asked if the bill would prevent injunctions against railroad strikes, and Mr. LaGuardia said no:

> "Will the gentleman answer this question? Does this make

a long and unbroken line of cases subsequent to *Chicago River* have held that, notwithstanding Norris-LaGuardia, strike injunctions may be granted where the

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it possible for lack of an injunction to tie up railroads and prevent them from transporting milk, for instance?

"MR. LAGUARDIA. I think the gentleman was a Member of the House in 1926?

"MR. LANKFORD of Virginia. No.

"MR. LAGUARDIA. We then passed the railroad labor act, and that takes care of the whole labor situation pertaining to the railroads. They could not possibly come under this for the reason that we provided the machinery there for settling labor disputes.

". . . .

"MR. LANKFORD of Virginia. It does not apply to the transportation of milk or other necessities that go in interstate commerce?

"MR. LAGUARDIA. Interstate traffic is entirely covered in the railroad labor act of 1926." *Id.* at 5499.

Finally, Congressman Beck offered an amendment to the bill to exempt public utilities from the anti-injunction provisions. The amendment was defeated, with Mr. LaGuardia arguing against it on the ground that the Railway Labor Act made it unnecessary:

"MR. LAGUARDIA. Mr. Chairman, I rise in opposition to the amendment offered by the gentleman from Pennsylvania.

"I just want to call attention to the railroad labor act of 1926, which provides in the very beginning of the act:

"[Here was quoted Sections 2 First through Fourth] . . . .

"Mr. Chairman, the law provides every detail for the settlement of disputes. Then, if all direct negotiations fail, the law establishes and maintains a permanent board of mediation. Now, in section 8 of this bill it is provided:

'No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.'

"So that there is the tie-up between the provisions of the railroad labor act and the necessity of exhausting every rem-

union has not complied with the "major disputes" requirements of the Act. Moreover, these courts' view of *Chicago River* corresponds entirely with this Court's discussion of that opinion in *Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960). In

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edy to adjust any difference which might arise. The workers could not and would not think of going on strike before all the remedies provided in the law have been exhausted. If the railroads have complied, they would not, as has been suggested, be deprived of any relief which they may have in law or equity.

"I submit that the amendment is not at all necessary." *Id.* at 5504.

In the Senate debates Senator Steiwer of Oregon asked whether the bill might act to bar injunctive relief sought by unions against the railroads, as in the *Texas & N.O.* case. Senator Blaine, one of the leading spokesmen for the bill, explained that the bill would not bar injunctive relief sought "with respect to the substantive law written into the railway labor act":

"MR. BLAINE. It is a very simple case—the Texas case involving the railroad clerks. They have certain rights under substantive law; these rights can be enforced only through an equity proceeding; and there is no penalty imposed by the railway labor act against the violation of the provision I just read, and that is the only provision that is of any great consequence, at least in this discussion. There is no remedy by which the employees may recover damages; the only remedy they have is by injunctive process; and they would allege that there is no remedy at law. To me it seems very clear that the subject the Senator is discussing is entirely separate and apart from the railway labor act. I can not see how it is applicable to this proposed act.

". . . .

"MR. BLAINE. Mr. President, I have concluded my statement, and I am quite sure that there is no logical argument by which the Senator from Oregon can construe the provisions of section 6 to deny the working men any rights they may have under any substantive law, either statutory or court-made; certainly not with respect to the substantive law written into the railway labor act." 75 *Cong. Rec.* 4937-38 (1932).

that "major dispute" case, this Court held that Norris-LaGuardia precluded a strike injunction because the union *had* complied with the Railway Labor Act—in particular, with Section 2 First.[6] For this reason, the Court explained, *Chicago River* was not in point, for there the Court had

> "held that a strike could be enjoined to prevent a plain violation of a basic command of the Railway Labor Act 'adopted as a part of a pattern of labor legislation.' 353 U.S. 30, 42. The Court there regarded as inapposite those cases in which it was held that the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other, non-labor statute [footnote omitted]. *Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes 'concerning rates of pay, rules and working conditions.'* 45 U.S.C. § 152, First." *Id.* at 339 (emphasis supplied).

The opinion of the four dissenting Justices, moreover, rested upon the same view of *Chicago River*—that Norris-LaGuardia does not bar injunctions against strikes where the union has not complied with the Railway Labor Act. The dissenting Justices parted from the majority with respect to the question whether the union's demand was a legitimate subject of mandatory bargaining—the question, that is, whether the

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[6] For another decision applying Norris-LaGuardia in a "major dispute" where there had been no violation of the Railway Labor Act, see *Brotherhood of R.R. Trainmen* v. *Toledo, P. & W.R.R.*, 321 U.S. 50 (1944).

union had in fact complied with the Railway Labor Act. As to Norris-LaGuardia, the dissenters said:

> ". . . This Court has consistently held that the Norris-LaGuardia Act does not prevent a federal court from enjoining an unlawful abuse of power conferred upon a labor union by the Railway Labor Act or a threatened strike to force acceptance of an unlawful demand.
>
> . . . . .
>
> "There [in *Chicago River*], as here, the union's demand was in derogation of the specific provisions of an Act of Congress, and here, as there, those specific provisions must 'take precedence over the more general provisions of the Norris-LaGuardia Act.'" *Id.* at 360, 361.

It was for these reasons, and upon the basis of these authorities, that in our opening brief (pp. 24-25) we asserted that, if the Congress intended that Section 2 First impose judicially enforceable obligations, the Norris-LaGuardia Act would not stand in the way of a strike injunction. Our point, in sum, is this: Section 2 First adds a substantive, legally enforceable obligation to the formal obligations of notices, conferences, and mediation imposed by other provisions of the Railway Labor Act. Under that Act the union's right to strike does not ripen until that substantive obligation is met. That being so, this Court's decisions respecting the relationship between the Norris-LaGuardia and Railway Labor Acts, as well as the legislative history of the Norris-LaGuardia Act, establish that the courts may enjoin a strike called prior to discharge of this obligation.

c. The *amicus* pays little heed to these considerations of dominant importance with respect to the relationship between the Railway Labor and Norris-LaGuardia

Acts. The *amicus* concedes, at least *arguendo,* that the Congress did intend Section 2 First to impose a legally enforceable obligation upon the parties to bargain in good faith while exhausting the major disputes procedures of the Railway Labor Act (Br. p. 17). The *amicus* does not question that, despite Norris-LaGuardia, strike injunctions may issue where the union has violated other major disputes requirements of the Railway Labor Act (Br. pp. 12-15). Nevertheless, the *amicus* contends that Norris-LaGuardia should be read to bar strike injunctions where the union has violated Section 2 First. But the *amicus* points to no statutory language, no legislative history, and no precedent in support of this proposed exception to the general rule respecting the interrelationship of these two statutes. Given the central importance of Section 2 First in the statutory scheme, it is hardly surprising that there is no basis in the relevant materials for inferring a legislative purpose to immunize from injunctive relief this single class of violations of the Railway Labor Act.

d. What the *amicus* does say, as we read its brief, is that on broad policy grounds having to do with the respective impact upon unions and employers of elimination of strike injunctions in this type of case, such injunctions should be barred in all circumstances. For the reasons we have stated, the intent of the Congress is quite clear enough to foreclose this sort of speculative inquiry. The Congress has struck the balance between competing policy considerations, whether wisely or not. But in any event, the *amicus'* points are not well taken.

(1) First, the *amicus* says that where the union does not comply with Section 2 First "an injunction

requiring good faith bargaining" "'can effectively guard the plaintiff's right'" (Br. p. 17). The *amicus* evidently recognizes that a suit for such an injunction would be of little utility unless brought well in advance of the expiration of the relevant "cooling off" period so that an injunction could be secured and enforced in sufficient time for an agreement to result from good faith bargaining before a strike. For the *amicus* suggests that such an injunction should be sought "expeditiously prior to the time self help is permissible" (*ibid.*). But this suggestion ignores the realities of collective bargaining under the Railway Labor Act. Because of those realities, such an injunction suit would not afford a practical remedy. Moreover, the institution of such suits would undermine, rather than secure, the aim of peaceful resolution of disputes. These would be the consequences for the following reasons:

In the first place, suits brought early enough for relief to be effective would generally be too early for relief to be granted. Where bad faith bargaining is not manifested, or does not occur, until the late stages of negotiation, this would obviously be true. But it would likely be true even where there are early signs of bad faith bargaining. It is a commonplace, as the *amicus* recognizes (Br. p. 14), that in important railway labor disputes bargaining is likely to become more intensive as the various "cooling off" periods run their course. Unreasonable and seemingly intractable demands are often dropped during the protracted proceedings of the Act. In such circumstances, where the claim hinges upon "the entire course of the negotiations," as the *amicus* characterizes bad faith bargaining claims (Br. p. 5), a carrier would be hard pressed to make out a case at the initial, rather than

the terminal, stages of the fixed statutory periods. That is why, in a case in which a carrier sought the sort of relief recommended here by the *amicus,* the court dismissed the case as premature:

> ". . . It is the philosophy of the Act that discussion, bargaining and mediation will dissipate many problems. If these four proposals are as meritless as they appear to plaintiffs to be, they may well topple of their own weight in the light of further discussion in the mediation process. Furthermore, as counsel for defendants argue, said proposals may be modified, or even withdrawn. Failing all of this, and should defendant Brotherhoods persist in their insistence upon discussing said proposals, and should plaintiffs' worst fears materialize and a strike become imminent, it may be that plaintiffs may then seek an injunction if willing to assume the burden of proving that the defendants have not complied with their statutory duty to bargain in good faith. . . ." *Southern Ry.* v. *Brotherhood of Locomotive Fire. & Eng.,* 223 F.Supp. 296, 307-308 (M.D.Ga. 1962), *aff'd on basis of opinion below,* 324 F.2d 503 (5th Cir. 1963).

Moreover, the institution of such litigation, especially since it involves allegations of bad faith, would impede the development of the collaborative efforts necessary to settle disputes. This Court identified this problem last Term in *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235, 248 (1970), in rejecting the same sort of argument advanced in that case by the *amicus.* There, in urging the applicability of Norris-LaGuardia to a strike injunction sought to enforce a no-strike contractual clause, the *amicus* pointed to alternative remedies such as damages and employee discipline.[7]

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[7] Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae, pp. 26-32.

This Court's response is as relevant here as in *Boys Market:*

> "While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. *Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union." Id.* at 248 (emphasis supplied; footnote omitted).

Similarly, in *International Ass'n of Machinists* v. *NMB,* 425 F.2d 527, 542 (D.C. Cir. 1970), the court observed:

> "The mediation conducted after filing of the complaint under the shadow of litigation overhanging the Mediation Board is not the kind of mediation envisaged by Congress in § 5 of the Act. Its failure or inconclusiveness does not demonstrate similar lack of success for a mediation process conducted without the artificial pressure and distortion of an overhanging litigation. A party that brings a court action may well acquire a stake in showing that mediation won't work."

In short, the availability of strike injunctions in cases where the union has violated Section 2 First *is* necessary to enforce the Railway Labor Act.

(2) Another major element of the *amicus'* analysis is rooted in the prediction that the courts will frequently err in judging bad faith bargaining claims because the issue is complex. The *amicus* apparently recognizes that such a contention does not advance its case unless the expected error will tend to favor car-

riers more often than unions. But it will, the *amicus* says, because:

> "... Frankfurter and Greene's The Labor Injunction (1930) teaches that where the standards are amorphous the tendency of the District Courts in labor disputes has been to grant preliminary relief with a free hand on the theory that maintenance of the status quo is an absolute value" (Br. p. 8).

Here again, the *amicus* advances an argument that it pressed unsuccessfully in *Boys Market* (Br. note 6 *supra,* pp. 14, 18-21). This Court's response was:

> "The Norris-LaGuardia Act was responsive to a situation totally different from that which exists today. In the early part of this century, the federal courts generally were regarded as allies of management in its attempt to prevent the organization and strengthening of labor unions; and in this industrial struggle the injunction became a potent weapon that was wielded against the activities of labor groups.[19] The result was a large number of sweeping decrees, often issued *ex parte,* drawn on an *ad hoc* basis without regard to any systematic elaboration of national labor policy. ..." 398 U.S., at 250.

"[19] See generally F. Frankfurter & N. Greene, The Labor Injunction (1930)."

And as to the difficulty of the Section 2 First issue, the same argument was made in *Virginian.* As we have already pointed out (Br. p. 50), this Court responded as follows:

> "Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees." 300 U.S., at 550.

Nor can it be contended that Section 2 First questions are any more intricate than other questions of violation of the Railway Labor Act that are regularly decided in strike injunction suits. To see that this is so, one need only read the majority and minority opinions in *Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960), with respect to the question whether a Section 6 notice bears upon a subject of mandatory bargaining under the Act, or the majority and dissenting opinions (by then Circuit Judge Marshall) in *Rutland Ry. Corp.* v. *Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir. 1962), with respect to the question whether a dispute is "minor" or "major."[8]

(3) A further difficulty with the *amicus'* argument is that, to the extent Section 2 First issues are complex and courts are inclined against unions, the complexity and the bias would be no less in suits to require good faith bargaining—the kind of suits the *amicus* recommends as a substitute for strike injunction suits. The *amicus* recognizes the problem and acknowledges it must show more:

> "The foregoing points, going as they do to considerations of substantive law, would be valid even if this were not a 'strike injunction suit.' We emphasize them because the possibility of such an injunction so exacerbates these problems as to make a qualitative difference." (Br. p. 8)

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[8] On the question whether courts should determine Section 2 First questions, we note also that Congress has directed both the district courts and the courts of appeals to determine a host of complex questions relating to collective bargaining under the Labor Management Relations Act, both where injunctions are involved and where they are not. Labor Management Relations Act §§ 10(e), (f), and (j), 29 U.S.C. §§ 160(e), (f), (j).

The "exacerbation," in *amicus'* view, would result from the temptation that would result from the availability of injunctive relief for the parties "both to structure their actions so as to strengthen their litigating posture, and to litigate with inadequate cause" (Br. p. 8). As to the *amicus'* dark prediction respecting the "structuring" of negotiations, it is not easy to see what evil the *amicus* has in mind. Perhaps both parties would conduct their negotiations with an eye toward giving an appearance, at least, of bargaining in good faith; but while this might cloak statutory violations, the situation would hardly be improved by withholding relief even in those cases where the violation can be proved. And as to *amicus'* assertion that acceptance of our position would produce "a virtual certainty that every unsettled major dispute will be brought to the federal courts on allegations of bad faith bargaining" (Br. p. 8), the answer is that nothing of the sort has happened during the twelve or more years that lower court decisions have confirmed the availability of this avenue.[9]

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[9] Respondent says that the relevant line of decisions began in 1958 (Br. pp. 25-26). We put it earlier (Br. pp. 61-70). But for purposes of testing the *amicus'* prediction, 1958 is quite early enough.

While the fact that during this time only a small number of disputes have "been brought to the federal courts on allegations of bad faith bargaining" makes it unnecessary to speculate about the reasons, one consideration that is doubtless relevant is the fact that good faith bargaining claims are often difficult to prove, together with the fact that in most situations the relief would be merely temporary. A party can, of course, purge itself of bad faith bargaining. See, *e.g.*, *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n*, 416 F.2d 633, 636 (4th Cir. 1969). The procedures of the Act can, accordingly, be exhausted after a judgment of bad faith bargaining. Thus the situation is unlike that where the dispute is "minor" or where the union's Section 6 notice relates to improper demands. Moreover, since the courts, as the *amicus* observes, cannot compel agreement, the result of the bargaining may be no different after a bad faith bargaining strike injunction than before.

(4) A related argument is that the availability of injunctive relief for Section 2 First violations would "dissipate the pressures for settlement" that would otherwise arise from a "fixed cut off date" for strike-free negotiations (Br. pp. 13-15). In view of the uncertain outcome of litigation of this sort, together with the grave consequences to a railroad of even a brief strike, this assertion is, in our view, baseless as a general matter. The low incidence of such litigation supports our view. Of course, where the union's violation of Section 2 First is palpable and destructive of the possibility of a genuinely negotiated agreement, the availability of a strike injunction might "dissipate the pressures for settlement." But that is exactly as it should be. The other side of it is that, if a strike injunction were *not* available, the "pressures" for good faith bargaining would be "dissipated" whereas the "pressures for settlement" by the carrier would be overwhelming even though the union, instead of bargaining in good faith, has bent its full efforts to exerting those "pressures." And that is exactly as it should *not* be.

(5) The *amicus* attempts to support its contention respecting subversion of collective bargaining by pointing to the facts of the case at bar. But it misapprehends the facts. It is simply not true that petitioner "held back" its "charges . . . like an ace in the hole, until . . . the Union's right to self help had matured" (Br. p. 9). If that were so, presumably the union would have raised an estoppel defense in this equity action. The company, in a letter to the mediator at the start of mediation, explicitly and formally stated its view that the union's actions contravened Section 2 First, while at the same time acknowledging that the matter did not fall within the province of the mediator (A. 197-198; see also A. 80-81). Nor is it true that

"[t]he incidents upon which the Company's claim rests occurred between March 1968 and June 1969 (Br. p. 9). Rather, they continued up until the eve of the suit, as the testimony makes quite plain (A. 47-48, 142-143, 147-150).

(6) The *amicus* says (Br. p. 18) that, as opposed to *Chicago River* and *Boys Market,* a strike injunction based upon a breach of Section 2 First would leave the union without "any reasonable alternative" such as arbitration. But, as we have demonstrated, if strike injunctions are not available, then the company is left without "any reasonable alternative" even though the union has violated the Act. And if the union *has* violated the Act, then there is no reason for it to have an "alternative" other than complying with the Act. If it does comply, then the inhibition upon the strike weapon is different in kind from the absolute bar imposed by *Chicago River.* "Restraint conditioned in this respect does not deny the right to strike over a major dispute; but it delays this right until the union satisfies the mandate of the Railway Labor Act." *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n,* 416 F.2d 633, 636 (4th Cir. 1969).[10] Perhaps the *amicus*

[10] The *amicus* says the timing of a strike may be important (Br. p. 12). This is evidently to offset the consideration that, while temporary restraining orders may be granted without full hearing, they may last for no more than 20 days without the consent of the parties. Rule 65(b), Fed. R. Civ. P. Preliminary injunctions, of course, are granted only after a full hearing, and the final hearing may be advanced and consolidated with the hearing on the preliminary injunction. See Rule 65(a), Fed. R. Civ. P. Perhaps the timing of a strike may bear upon its effectiveness in strongly cyclical businesses, or in companies where the unions are weak. But timing is of no practical importance whatever in the railroad industry, where the unions are firmly established and where any strike of any significant duration at any time has a devastating impact upon the carrier.

has in mind again the possibility that courts will err. We have already spoken to that point, and add only the suggestion that the wisdom of bringing judicial remedies into play ought to be tested on the assumption that the courts will correctly apply the law rather than on the assumption that they will not.

(7) Finally, while we have already spoken in general about the unreliability of analogies to the Labor Management Relations Act in Railway Labor Act cases, a few more specific comments about the *amicus'* heavy reliance upon that statute are in order. First, we suggest that if *Boys Markets* means anything in this case, it supports our position. We have already noted that some of the policy arguments advanced here by *amicus* were rejected in *Boys Markets*. But more importantly, in *Boys Markets,* this Court held Norris-LaGuardia inapplicable even though the action of the union did not violate any obligation prescribed by a federal labor law, whereas the question here is whether Norris LaGuardia should bar relief against a violation of what this Court has termed the "heart" of the Railway Labor Act.[11]

Second, insofar as strike injunctions based on bad faith bargaining claims are concerned, it is clear at a minimum that whatever lesson the Labor Management Relations Act teaches does not aid the *amicus*. So respondent evidently views the matter, for it objects that the result for which we contend "would incorporate into Section 2 First . . . the provisions of Sections 8

[11] Moreover, the embarrassments of conflicting state and federal court remedies that led the Court in *Boys Markets* to reconsider *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962), would arise in the same measure in cases like the one at bar if Norris-LaGuardia were held applicable.

and 10 of the Labor Management Relations Act notwithstanding the different policies of the two statutes (Br. 31-32).

The central question put by the *amicus* is whether the Congress intended the courts to be free to enforce Section 2 First by way of strike injunctions. The *amicus* concedes implicitly (Br. p. 10), and the respondent explicitly (Br. p. 31), that the Congress provided for the availability of such injunctions under the Labor Management Relations Act notwithstanding Norris-LaGuardia. If any inference is to be drawn, it ought to be that the Congress would not have permitted such injunctions in a statute regulating the broad range of American industry and have forbidden them in an industry singled out for special legislative attention because of the enormous impact of rail strikes upon the public.[12]

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[12] "In our complex society, metropolitan areas in particular might suffer a calamity if rail service for freight or for passengers were stopped. Food and other crucial supplies might be dangerously curtailed; vital services might be impaired; whole metropolitan communities might be paralyzed." *Brotherhood of Railway Clerks* v. *Florida E.C. R.R. Co.*, 384 U.S. 238, 245 (1966).

The *amicus* says that "the normal remedy" under the Labor Management Relations Act is not a strike injunction but an order to bargain in good faith, and that it is "unaware of a single strike injunction based on a failure to bargain in good faith." (Br. p. 10). Our research, which is incomplete because of limitations of time, leave us unclear as to the "normal remedy" in bad faith bargaining situations *where the union is striking.* For in fact the NLRB *has* sought strike injunctions in such situations—and its applications have been successful—in a significant number of cases. See, *e.g.*, *Alpert* v. *International Typographical Union*, 161 F. Supp. 427 (D. Mass. 1958); *NLRB* v. *National Maritime Union*, 175 F. 2d 686, 688 (2d Cir. 1949), *enforcing* 82 NLRB 1365, 24 LRRM 1004 (1949); *Douds* v. *International Longshoremen's Ass'n*, 31 CCH Lab. Cas. ¶ 70, 332,

Finally, the decisions other than *Boys Markets* cited by the *amicus* are of no pertinence here. They set down guidelines for the NLRB to follow in determining bad faith bargaining claims—but this case is not here on the merits. And they stand for the unquestioned principle that neither the NLRB nor the courts may dictate the terms of settlement—but that does not mean, as this Court said in *Virginian,* that "since equity cannot compel the parties to agree, it will not compel them to take the preliminary steps which may result in agreement." 300 U.S. at 550.

CONCLUSION

For the reasons set forth above, together with those set forth in our opening brief, the judgment of the Court of Appeals should be set aside and the case re-

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p. 92,825 (S.D. N.Y. 1956); *International Typographical Union* v. *NLRB,* 278 F. 2d 6, 12-13, 15 (1st Cir. 1960), *enforcing* 123 NLRB No. 97, 43 LRRM 1538, 1544 (1959) *aff'd in part and rev'd in part,* 365 U.S. 705 (1961); *American Newspaper Publishers Ass'n* v. *NLRB,* 193 F. 2d 782, 806 (7th Cir. 1951), *enforcing* 86 NLRB No. 116, 25 LRRM 1010, 1016 (1949), *aff'd as to other issues,* 345 U.S. 100 (1953); *McLeod* v. *Compressed Air Workers,* 292 F. 2d 358, 359 n. 1 (2d Cir. 1961); *Madden* v. *International Union, UMW,* 79 F. Supp. 616 (D. D.C. 1948); *NLRB* v. *Amalgamated Lithographers,* 309 F. 2d 31 (9th Cir. 1962), *enforcing* 130 NLRB No. 102, 47 LRRM 1374 (1961); *Elliott* v. *Local Union 49, Sheet Metal Workers,* 34 CCH Lab. Cas. ¶ 71, 553 (D. N.M. 1958); *Employing Lithographers* v. *NLRB,* 301 F. 2d 20 (5th Cir. 1962), *enforcing,* 130 NLRB No. 107, 47 LRRM 1380 (1961). Moreover, in cases of broad public importance the federal government can seek a 90-day strike injunction under Section 208 of the LMRA (29 U.S.C. § 178), obviating the need for the NLRB to move under Section 10(j) (29 U.S.C. § 160(j)). At all events, the practices of the NLRB, whatever they may be, are of the most distant relevance to the case at bar.

manded for a determination on the merits of petitioner's claim.

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January 1971

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL REPLY BRIEF FOR THE PETITIONER

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SUPPLEMENTAL REPLY BRIEF FOR THE PETITIONER

While we are reluctant to add to the papers already filed in this case, we file this supplemental reply brief because it has just come to our attention that the United States, in an important railway labor case, is seeking an injunction to prevent a carrier from

putting its Section 6 proposals into effect on the ground that, although all formal procedures of the Railway Labor Act have been exhausted, the carrier violated Section 2 First. The case is a continuation of the *Florida East Coast Railway Company* litigation. Those proceedings are fully described in a brief by the United States that we have lodged with the Clerk. In sum, the situation is this:

The strike against the Florida East Coast Railway Company, which arose out of "the Nation's longest railroad labor dispute," *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 371 (1969), has been before this Court four times in one way or another. *Brotherhood of Ry. Clerks* v. *Florida E.C. R.R.*, 384 U.S. 238 (1966); *Atlantic C.L. R. Co.* v. *Brotherhood of R.R. Trainmen*, 385 U.S. 20 (1966); *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co., supra; Atlantic C.L. R. Co.* v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970).

The current district court proceeding, *United States* v. *Florida East Coast Railway Company* (No. 64-107-Civ.-J, M.D. Fla.), is a continuation of the litigation that was commenced by the United States in 1964 and that led to one of this Court's decisions, *Brotherhood of Ry. Clerks* v. *Florida E.C.R.R., supra.* There, this Court held that, even though the railroad had not exhausted the procedures of the Railway Labor Act with respect to changes that it wished to make in the existing collective bargaining agreements, the District Court could, under strike conditions, authorize those changes "reasonably necessary" for the railroad to continue its operations, provided that the court "sat-

isf[ied] itself that the carrier is engaged in a good-faith effort to restore service to the public. . . ." 384 U.S., at 247-248, note 8.

Thereafter, the railroad exhausted the formal procedures of the Act with respect to its Section 6 notice, which proposed a wide-ranging reformation of the existing agreements. After mediation sessions had been held, the National Mediation Board, having "recognize[d] the hopelessness of trying to bring the parties together," terminated its services in February of 1969 (Gov't Br. pp. 11, 36). The attempt by the railroad to put its proposals into effect upon expiration of the 30-day "cooling off" period, however, was halted by the District Court upon the application of the unions, who relied, *inter alia,* upon allegations that the railroad "had not complied with its duty to bargain in good faith over its proposals" (Gov't Br. p. 12). Indeed, the court found the railroad in contempt for having implemented the notices without court approval (*ibid.*).

The case is set for final trial, as we understand it, in March of this year. While there are several issues involved, such as the Government's motion for a judgment of contempt (Gov't Br. p. 16), "[t]he most significant issue to be ultimately adjudicated in this case is whether the defendant may implement its § 6 notices" (Gov't Br. p. 19). And as to that, the principal challenge made by the United States is that the railroad has not "satisfied the RLA's good-faith requirements which are essential to the right to implement § 6 notices" (*ibid.*). As the United States puts it, "The question to be considered here is whether defendant can be permitted to institute unilaterally those

changes in rates of pay, rules, and working conditions over which it has failed to bargain, thereby cutting out the heart of the Act and profiting from its own unlawful conduct" (Br. p. 34).

In its brief, the Government first discusses the facts that, it maintains, show that the railroad was "merely 'going through the motions of negotiating' and waiting for the clock to run out" in order to exercise self-help (Br. p. 28). The Government's allegations are not different in principle from the allegations made by petitioner in the case at bar. This is how the Government summarizes its charges:

> "Perhaps no individual act or position of FEC constitutes 'bad faith' bargaining. But when viewed in their totality, we submit, FEC's actions —e.g., its requirement that one agreement govern its relations with all organizations or there be no agreement at all; its additional refusal to even discuss the underlying strike issue; its insistence upon a clause reserving to itself unilateral control over virtually all rules and working conditions; its constant 'fouls' with the law; its adamant demands for the same provisions which it had unlawfully installed after the commencement of the strike; its *sub rosa* contracting while insisting upon an expanded future right to contract out work; and its refusal to discuss the union's counterproposals—coupled with the fact that the unions clearly could not agree to many of these positions without change or modification, manifest its wish to defeat agreement in violation of its duty to bargain under Section 2 First of the Act. This record, as a whole, strongly indicates that the carrier had no desire to end the strike, but really intended to use the strike as a basis for scrapping the existing agreements and instituting its own changes . . ." (Br. p. 33).

Next, the Government analyzes in detail the authorities supporting its contention that "a party to a Railway Labor Act agreement cannot implement a Section 6 notice if it has failed to bargain over the notice in good faith notwithstanding termination of the NMB's services and running of the cooling off period" (Br. p. 34). They are the same authorities upon which we rely.

As to public policy, the United States says this:

> "When Congress first enacted the Railway Labor Act in 1926, it seized upon collective bargaining as the tool most consistent with our free enterprise economy to prevent labor disputes from interrupting commerce. Consistent with Congress' belief that labor strife will be minimized if management and labor can be brought together in an honest effort to iron out their differences, the Act's overriding purpose is to further collective bargaining. It must be emphasized that the Act is not a compulsory arbitration statute; without the parties' genuine, good-faith efforts to reach agreement, perfunctory compliance with its machinery accomplishes nothing, other than a mere temporary postponement of the labor strife and interruptions to commerce Congress sought to prevent. Good faith bargaining is not only the 'heart of the Act'; it is also the cornerstone on which our national labor policy rests. To construe the Act in the way defendant urges, we submit, would have serious repercussions on this important national policy. For as a practical matter, there is no distinction between token compliance with the Act's procedures and the noncompliance condemned in such strong terms by the Supreme Court in 1966. *Brotherhood of Railway Clerks* v. *Florida East Coast Ry., supra,* 384 U.S. at 247. Herein lies the public interest which caused the United States

> to file this action in 1964 and which leads it to oppose defendant's motion now."

This case is relevant not only because it discloses that the Government shares our view of the importance and enforceability of Section 2 First—though surely it is not without interest that the Government maintains today the same position that it urged in *Virginian* and in *Chicago, R.I. & P.R.R.* v. *Switchmen's Union,* 187 F.Supp. 581 (W.D.N.Y. 1960) (see our opening brief at pp. 49, 76). More importantly, the case discloses in a concrete way how the role of Section 2 First for which we contend would secure *both* parties against the exercise of self-help by the other if the right to self-help had not been earned by good-faith bargaining and why that result secures the public interest. Of course, the Government's charges may turn out to be unfounded. But in another case similar charges might

be true. The decision in the case at bar will determine whether such charges may be entertained.*

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* As to another matter, we add that additional research has uncovered five more cases under the Labor Management Relations Act in which injunctions against strikes, either pending NLRB action or by way of enforcement of an NLRB order, were granted by courts where a violation of the good faith bargaining requirement was involved. See *Local 164 Brotherhood of Painters* v. *NLRB*, 293 F.2d 133 (D.C. Cir. 1961), *enforcing 126 NLRB No. 111*, 45 LRRM 1421, 1422 (1960); *Schneid* v. *District 50, UMW*, 33 CCH Lab. Cas. ¶ 70,885 (N.D. Ill. 1957); *Local 219, Retail Clerks Int'l Ass'n* v. *NLRB*, 265 F.2d 814 (D.C. Cir. 1959), *enforcing* 120 NLRB No. 48, 41 LRRM 1479, 1480 (1958); *Pennello* v. *International Union, UMW*, 88 F. Supp. 935 (D.D.C. 1950), injunction printed at 25 LRRM 2368, 2374; *Kaynard* v. *Communications Workers*, 61 CCH Lab. Cas. ¶ 10,485 (E.D.N.Y. 1969). This casts additional doubt on the *amicus curiae's* assertion as to the "normal remedy" under the LRMA. See our reply brief p. 30 note 12.

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CHICAGO & NORTH WESTERN RAILWAY CO. *v.* UNITED TRANSPORTATION UNION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 189. Argued January 18, 1971—Decided June 1, 1971

Petitioner railroad brought this suit (after formal procedures of the Railway Labor Act had been exhausted) to enjoin a threatened strike by respondent Union, charging that the Union had failed to perform its obligations under § 2 First of the Railway Labor Act "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." The Union answered that the Norris-LaGuardia Act deprived the District Court of jurisdiction to enjoin the strike and that in any event the complaint failed to state a claim on which relief could be granted. The District Court, declining to pass on whether either party had violated § 2 First, concluded that the matter was one for administrative determination by the National Mediation Board and was not justiciable, and that §§ 4 and 7 of the Norris-LaGuardia Act deprived the court of jurisdiction to enjoin the threatened strike. The Court of Appeals affirmed, construing § 2 First as hortatory and not enforceable by the courts but only by the National Mediation Board. *Held:*

1. Sec. 2 First was intended to be, not just a mere exhortation, but an enforceable legal obligation on carriers and employees alike. Pp. 4–7.

2. The obligation imposed by § 2 First, which is central to the effective working of the Railway Labor Act, is enforceable in the courts rather than by the Mediation Board, as is clear from the Act's legislative history. Pp. 7–11.

3. Sec. 4 of the Norris-LaGuardia Act does not prohibit the use of a strike injunction where that remedy is the only practical, effective means of enforcing the duty imposed by § 2 First. Pp. 11–13.

422 F. 2d 979, reversed and remanded.

Syllabus

HARLAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which BLACK, DOUGLAS, and WHITE, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 189.—October Term, 1970

Chicago and North Western Railway Company, Petitioner, *v.* United Transportation Union.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 1, 1971]

Mr. Justice Harlan delivered the opinion of the Court.

The Chicago and North Western Railway Co., petitioner in this action, brought suit in the United States District Court for the Northern District of Illinois to enjoin a threatened strike by the respondent, the United Transportation Union. The substance of the complaint was that in the negotiations between the parties over work rules, the Union had failed to perform its obligation under § 2 First of the Railway Labor Act, 45 U. S. C. § 152 First, "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." [1] Jurisdiction was said to rest on 28 U. S. C. § 1331 and 28 U. S. C. § 1337. The Union in its answer contended that §§ 4, 7, and 8 of the Norris-

[1] The subsection provides:

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

LaGuardia Act, 29 U. S. C. §§ 104, 107, 108,[2] deprived the District Court of jurisdiction to issue a strike injunction and that in any event the complaint failed to state a claim upon which relief could be granted.[3] The District Judge, having heard evidence and argument, declined to pass on whether either party had violated § 2 First. In an unreported opinion, he concluded that the question was a matter for administrative determination by the National Mediation Board and was nonjusticiable; he further ruled that §§ 4 and 7 of the Norris-LaGuardia Act deprived the court of jurisdiction to issue an injunction against the Union's threatened strike. The Court of Appeals for the Seventh Circuit affirmed, 422 F. 2d 979, construing § 2 First as a statement of the purpose and policy of the subsequent provisions of the Act, and not as a specific requirement anticipating judicial enforcement. Rather, in that court's view, the enforcement of § 2 First was solely a matter for the National Mediation Board. *Id.*, at 985–988. We granted certiorari to consider this important question under the Railway Labor Act, on which the lower courts had expressed divergent views.[4] For reasons that follow we reverse.

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[2] Section 4 reads in relevant part:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . . ."

Section 7 imposes strict procedural requirements on the issuance of injunctions in labor disputes. Section 8 is set out in n. 12 *infra*.

[3] The Union also averred that it had complied with the command of § 2 First and that the Railroad had been derelict in its duty under that section.

[4] See, besides the opinion below, *Piedmont Aviation, Inc.* v. *Air Line Pilots Association*, 416 F. 2d 633 (CA4 1969); *Brotherhood of*

I

For at least the past decade, the Nation's railroads and the respondent Union or its predecessors have been engaged in an off-and-on struggle over the number of brakemen to be employed on each train. We find it unnecessary to describe this history in any great detail, either generally or with particular reference to petitioner. Accounts at earlier stages may be found in *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.*, 372 U. S. 284, 285–288 (1963); *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Burlington & Quincy R. Co.*, 225 F. Supp. 11, 14–17 (DC), aff'd, 331 F. 2d 1020 (CADC 1964); *Brotherhood of R. R. Trainmen* v. *Akron & Barberton Belt R. Co.*, 385 F. 2d 581, 588–592 (CADC 1967); *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line R. Co.*, 383 F. 2d 225 (CADC 1967); and see the opinion of the court below, 422 F. 2d, at 980–982, and n. 4. For present purposes it is sufficient to observe that the parties have exhausted the formal procedures of the Railway Labor Act: notices, conferences, unsuccessful mediation, refusal by the Union to accept the National Mediation Board's proffer of arbitration, termination of mediation, and expiration of the 30-day cooling-off period of § 5 First, 45 U. S. C. § 155 First. The Railroad's charge that the Union had violated § 2 First was based principally on its contention that the Union had consistently refused to handle the dispute on a nationwide basis while maintaining an adamant determination that no agreement should be reached with the Chicago and North Western more favorable to the carrier than agreements which the Union had already

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Railroad Trainmen v. *Akron & B. B. R. R.*, 385 F. 2d 581 (CADC 1967), aff'g 253 F. Supp. 538 (1966); *Seaboard World Airlines, Inc.* v. *Transport Workers*, 425 F. 2d 1086 (CA2 1970); *United Industrial Workers* v. *Galveston Wharves*, 400 F. 2d 320 (CA5 1968).

reached with other railroads. The complaint also alleged that the Union had refused to bargain on the proposals in the Railroad's counternotices.

The narrow questions presented to us are whether § 2 First imposes a legal obligation on carriers and employees or is a mere exhortation; whether the obligation is enforceable by the judiciary; and whether the Norris-LaGuardia Act strips the federal courts of jurisdiction to enforce the obligation by a strike injunction. The parties have not requested us to decide whether the allegations of the complaint or the evidence presented at the hearing was sufficient to show a violation of § 2 First, and the lower courts, by their resolution of the threshold questions, did not reach the issue. Accordingly, we intimate no view on this matter.

II

This Court has previously observed that "[t]he heart of the Railway Labor Act is the duty, imposed by § 2 First upon management and labor, 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.'" *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 377–378 (1969). It is not surprising that such is the case. As one leading commentator has said, in connection with the duty under the National Labor Relations Act to bargain in good faith, "[i]t was not enough for the law to compel the parties to meet and treat without passing judgment upon the quality of the negotiations. The bargaining status of a union can be destroyed by going through the motions of negotiating almost as easily as by bluntly withholding recognition." Cox, The Duty To Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1412–1413 (1958). We recognized

this to be true when we said in *NLRB* v. *Insurance Agents' International*, 361 U. S. 477, 484–485 (1960), that "the duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union."

Virginian Railway v. *System Federation No. 40*, 300 U. S. 515 (1937), furnishes an early illustration of this principle in connection with the duty to "exert every reasonable effort" under the Railway Labor Act. In that case, the railroad refused to recognize a union certified by the National Mediation Board as the duly authorized representative of its shop workers, and instead sought to coerce these employees to join a company union. The employees sought and obtained an injunction requiring the railroad to perform its duty under § 2 Ninth to "treat with" their certified representative; the injunction also compelled the railroad "to exert every reasonable effort" to make and maintain agreements with the union. This Court affirmed that decree, explicitly rejecting the argument that the duty to exert every reasonable effort was only a moral obligation. This conclusion has been repeatedly referred to without criticism in subsequent decisions.[5]

The conclusion that § 2 First is more than merely hortatory finds support in the legislative history of the Railway Labor Act as well. As this Court has often noted, the Railway Labor Act of 1926 was, and was acknowledged to be, an agreement worked out between

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[5] *E. g.*, *Elgin, J. & E. R. R.* v. *Burley*, 325 U. S. 711, 721–722 n. 12 (1945), adhered to on rehearing, 327 U. S. 661 (1946); *Stark* v. *Wickard*, 321 U. S. 288, 306–307 (1944); *Order of R. R. Telegraphers* v. *Chicago & N. W. Ry.*, 362 U. S. 330, 339 (1960); *International Assn. of Machinists* v. *Street*, 367 U. S. 740, 758 (1961); *Brotherhood of Ry. Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U. S. 650, 658 (1965); *Detroit & T. S. L. R. R.* v. *United Transportation Union*, 396 U. S. 142, 149, 151 (1969).

management and labor, and ratified by the Congress and the President.[6] Accordingly, the statements of the spokesmen for the two parties made in the hearings on the proposed Act are entitled to great weight in the construction of the Act.[7]

In the House hearings, Donald R. Richberg, counsel for the organized railway employees supporting the bill, was unequivocal on whether § 2 First imposed a legal obligation on the parties. He stated, "it is [the parties'] duty to exert every reasonable effort . . . to settle all disputes, whether arising out of the abrogation of agreements or otherwise, in order to avoid any interruption to commerce. In other words, the legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate violation of that legal obligation could be prevented by court compulsion."[8] Mr. Richberg went on to describe why the bill had been drafted in general language applicable equally to both parties, rather than in terms of specific requirements or prohibitions accompanied by explicit sanctions:

> "[w]e believe, and this law has been written upon the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is more danger in attempting to write specific provisions and penalties into the law than there is in writing the general duties and obligations into the law and letting the enforcement of those

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[6] *E. g., International Association of Machinists* v. *Street*, 367 U. S. 740, 758 (1961).

[7] See, *e. g., Detroit & T. S. L. R. Co.* v. *United Transportation Union*, 396 U. S. 142, 151 n. 18, 152 n. 19, 153 n. 20 (1969).

[8] Hearings on Railway Labor Disputes before the House Committee on Interstate & Foreign Commerce, 69th Cong., 1st Sess., 91 (1926). See also *id.*, at 40–41, 66, 84–85.

> duties and obligations develop through the courts in the way in which the common law has developed in England and America." [9]

Accordingly, we think it plain that § 2 First was intended to be more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis.

The Court of Appeals, in seemingly coming to the contrary conclusion, relied on this Court's decision in *General Committee of Adjustment* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323 (1943). In that case, the Court held that jurisdictional disputes between unions were not justiciable, but were left by the Act either to resolution by the National Mediation Board under § 2 Ninth or to the economic muscle of the parties. Reliance had been placed on § 2 Second, which requires that all disputes should be considered and if possible decided in conference of the authorized representatives of the parties. The Court held that this reliance was misplaced: "Nor does § 2, Second make justiciable what otherwise is not. . . . § 2, Second, like § 2, First, merely states the policy which those other provisions buttress with more specific commands." *Id.*, at 334 (footnote omitted).

In light of the place of § 2 First in the scheme of the Railway Labor Act, the legislative history of that section, and the decisions interpreting it, the passing reference to it in the *M–K–T* case cannot bear the weight which the Court of Appeals sought to place upon it.

III

Given that § 2 First imposes a legal obligation on the parties, the question remains whether it is an obligation enforceable by the judiciary. We have often been con-

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[9] *Id.*, at 91. See also *id.*, at 66.

fronted with similar questions in connection with other duties under the Railway Labor Act.[10] Our cases reveal that where the statutory language and legislative history are unclear, the propriety of judicial enforcement turns on the importance of the duty in the scheme of the Act, the capacity of the courts to enforce it effectively, and the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory.

We have already observed that the obligation under § 2 First is central to the effective working of the Railway Labor Act. The strictest compliance with the formal procedures of the Act is meaningless if one party goes through the motions with "a desire not to reach an agreement." *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (CA1 1953). While cases in which the union is the party with this attitude are perhaps rare, they are not unknown. See *Chicago Typographical Union No. 16*, 86 N. L. R. B. 1041 (1949), enforced *sub nom. American Newspaper Publishers Assn.* v. *NLRB*, 193 F. 2d 782 (CA7 1951), aff'd as to another issue, 345 U. S. 100 (1953). We think that at least to this extent the duty to exert every reasonable effort is of the essence.[11]

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[10] See, *e. g.*, *Texas & N. O. R. Co.* v. *Brotherhood of Ry. Clerks*, 281 U. S. 548 (1930); *Virginian Ry.* v. *System Federation No. 40*, 300 U. S. 515 (1937); *Brotherhood of R. R. Trainmen* v. *Howard*, 343 U. S. 768 (1952).

[11] While we have no occasion to determine whether § 2 First requires more of the parties than avoidance of "bad faith" as defined by Judge Magruder in *Reed & Prince*, *supra*, we note two caveats. First, parallels between the duty to bargain in good faith and the duty to exert every reasonable effort, like all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes. Cf. *Brotherhood of R. R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 383 (1969). Second, great circumspection should be used in going beyond cases involving "desire not to reach an agreement," for doing so risks infringement

The capacity of the courts to enforce this duty was considered and affirmed in the *Virginian* case. Mr. Justice Stone, speaking for the Court, noted that "whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees." 300 U. S., at 550. Section 8 of the Norris-LaGuardia Act explicitly requires district courts to determine whether plaintiffs have "failed to make every reasonable effort" to settle the dispute out of which the request for the injunction grows.[12] We have no reason to believe that the district courts are less capable of making the inquiry in the one situation than in the other.

Finally we must consider the Court of Appeals' position that the question whether a party had exerted every reasonable effort was committed by the Railway Labor Act to the National Mediation Board rather than to the courts. We believe that the legislative history of the Railway Labor Act rather plainly disproves this contention. It is commonplace that the 1926 Railway Labor Act was enacted because of dissatisfaction with the 1920 Transportation Act, and particularly with the performance of the Railroad Labor Board. While there were many causes of this dissatisfaction, one of the most prominent was that because of its adjudicatory functions, the Board effectively lost any influence in attempting to

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of the strong federal labor policy against governmental interference with the substantive terms of collective-bargaining agreements. See n. 19 *infra*.

[12] The section provides in full:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." 29 U. S. C. § 108.

settle disputes. Throughout the hearings on the bill which became the 1926 Act there are repeated expressions of concern that the National Mediation Board should retain no adjudicatory function, so that it might maintain the confidence of both parties.[13] And as the Court noted in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 303 (1943), when Congress in 1934 gave the Board power to resolve certain jurisdictional disputes, it authorized the Board to appoint a committee of neutrals to decide the dispute "so that the Board's 'own usefulness of settling disputes that might arise thereafter might not be impaired.' S. Rep. No. 1065, 73d Cong., 2d Sess., p. 3." Only last Term we referred to the fact that "the Mediation Board has no adjudicatory authority with regard to major disputes." *Detroit and Toledo Shore Line R. R.* v. *United Transportation Union*, 396 U. S. 142, 158 (1969). In light of these considerations, we think the conclusion inescapable that Congress intended the enforcement of § 2 First to be overseen by appropriate judicial means rather than by the Mediation Board's retaining jurisdiction over the dispute or pre-

[13] *E. g.*, Hearings, *supra* n. 8, at 18 (Mr. Richberg):

"The board of mediation, to preserve its ability to mediate year after year between the parties, must not be given any duties to make public reports condemning one party or the other, even though the board may think one party is wrong. That is the fundamental cause of failure of the [Railroad] Labor Board. That is the reason why the Labor Board machinery never would work, because a board was constituted to sit and deliver opinions which must be opinions for or against one party, and as soon as that board began delivering opinions publicly against a party, that party was sure the board was unfair to it. That is human nature. The board, in other words, was created in a manner to destroy any confidence in itself.

"The board of mediators is not for that function. The board of mediators should never make any reports to the public condemning one party or the other. Their duty is that of remaining persuaders."

maturely releasing the parties for resort to self-help if it feels such action called for.[14]

IV

We turn finally to the question whether § 4 of the Norris-LaGuardia Act[15] prohibits the use of a strike injunction in all cases of violation of § 2 First. The fundamental principles in this area were epitomized in *International Association of Machinists* v. *Street*, 367 U. S. 740, 772–773 (1961):

> "The Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101–115, expresses a basic policy against the injunction of activities of labor unions. We have held that the Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act. *Virginian R. Co.* v. *System Federation*, 300 U. S. 515; *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U. S. 232. However, the policy of the Act suggests that the courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right."

Similar statements may be found in many of our opinions.[16] We consider that these statements properly ac-

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[14] If such were the exclusive remedy for violations of § 2 First, not only would it endanger the effectiveness of the Board's mediatory role and risk premature interruptions of transportation, but it would provide no remedy for cases where the violations of § 2 First occurred or first became apparent after the Board had certified that its mediatory efforts had failed.

[15] See n. 2 *supra* for the text.

[16] See *Virginian Ry.* v. *System Federation No. 40*, 300 U. S. 515, 562–563 (1937); *Graham* v. *Brotherhood of Locomotive Firemen &*

commodate the conflicting policies of our labor laws, and we adhere to them. We find it quite impossible to say that no set of circumstances could arise where a strike injunction is the only practical, effective means of enforcing the command of § 2 First. Accordingly, our prior decisions lead us to hold that the Norris-LaGuardia Act did not forbid the District Court from even considering whether this is such a case.[17] If we have misinterpreted the congressional purpose, Congress can remedy the situation by speaking more clearly. In the meantime we have no choice but to trace out as best we may the uncertain line of appropriate accommodation of two statutes with purposes that lead in opposing directions.[18]

We recognize, of course, that our holding that strike injunctions may issue when such a remedy is the only practical, effective means of enforcing the duty to exert every reasonable effort to make and maintain agreements falls far short of that definiteness and clarity which businessmen and labor leaders undoubtedly desire. It creates a not insignificant danger that parties will structure their

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Enginemen, 338 U. S. 232, 237 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768, 774 (1952); *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. R.*, 353 U. S. 30, 41–42 (1957); cf. *Order of Railroad Telegraphers* v. *Chicago & N. W. Ry.*, 362 U. S. 330, 338–339 (1960); *id.*, at 360–364 (dissenting opinion); *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 458 (1957).

[17] The congressional debates over the Norris-LaGuardia Act support a construction of that Act permitting federal courts to enjoin strikes in violation of the Railway Labor Act in appropriate cases. See 75 Cong. Rec. 4937–4938 (Sen. Blaine); *id.*, at 5499, 5504 (Rep. LaGuardia).

[18] Section 2 First was re-enacted in 1934, two years after the Norris-LaGuardia Act. Act of June 21, 1934, c. 691, 48 Stat. 1185. In the event of irreconcilable conflict between the policies of the earlier, general provisions of the Norris-LaGuardia Act and those of the subsequent, more specific provisions of § 2 First, the latter would prevail under familiar principles of statutory construction. *Virginian Ry.* v. *System Federation No. 40*, 300 U. S. 515, 563 (1937).

negotiating positions and tactics with an eye on the courts, rather than restricting their attention to the business at hand. Moreover, the party seeking to maintain the status quo may be less willing to compromise during the determinate processes of the Railway Labor Act if he believes that there is a chance of indefinitely postponing the other party's resort to self-help after those procedures have been exhausted. See *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 380–381 (1969); cf. Hearings, *supra* n. 8, at 17, 50, 100 (Mr. Richberg); *id.*, at 190 (Mr. Robertson). Finally, the vagueness of the obligation under § 2 First could provide a cover for freewheeling judicial interference in labor relations of the sort that called forth the Norris-LaGuardia Act in the first place.[19]

These weighty considerations indeed counsel restraint in the issuance of strike injunctions based on violations of § 2 First. See n. 11 *supra*. Nevertheless, the result reached today is unavoidable if we are to give effect to all our labor laws—enacted as they were by Congresses of differing political makeup and differing views on labor relations—rather than restrict our examination to those pieces of legislation which are in accord with our personal views of sound labor policy. See *Boys Markets* v. *Retail Clerks Local 770*, 398 U. S. 235, 250 (1970).

V

As we noted at the outset, we have not been requested to rule on whether the record shows a violation of § 2

[19] Section 8 (d) of the National Labor Relations Act, 29 U. S. C. § 158 (d), was added precisely because of congressional concern that the NLRB had intruded too deeply into the collective-bargaining process under the guise of enforcing the duty to bargain in good faith. See *NLRB* v. *American National Insurance Co.*, 343 U. S. 395 (1952); *NLRB* v. *Insurance Agents' International*, 361 U. S. 477 (1960).

First in circumstances justifying a strike injunction, and we do not do so. Such a question should be examined by this Court, if at all, only after the facts have been marshalled and the issues clarified through the decisions of lower courts.

In view of the uncertainty heretofore existing on what constituted a violation of § 2 First and what showing was necessary to make out a case for a strike injunction, we believe the appropriate course is to remand the case to the Court of Appeals with instructions to return the case to the District Court for the taking of such further evidence as the parties may deem necessary and that court may find helpful in passing on the issues which the case presents in light of our opinion today.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 189.—October Term, 1970

Chicago and North Western Railway Company, Petitioner, *v.* United Transportation Union.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 1, 1971]

Mr. Justice Brennan, with whom Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice White join, dissenting.

The instant dispute between the Chicago & North Western Railway Company (Railway) and the United Transportation Union (Union) reaches back to the decision of Arbitration Board No. 282, established pursuant to 77 Stat. 132 (1963). That board was established by Congress, after the failure of the dispute settlement machinery of the Railway Labor Act, to arbitrate disputes between various carriers and unions over the number of brakemen required on trains and the necessity of firemen on diesel locomotives. Insofar as is here pertinent, Board 282's award ultimately led to elimination of approximately 8,000 brakemen's jobs across the Nation. By its terms, however, the award expired January 25, 1966. Prior to expiration, the Union served upon the Railway notices under § 6 of the Railway Labor Act, 45 U. S. C. § 156,[1] which called for re-establishing many of the brakemen's positions eliminated by Board 282 by changing the existing agreements to require not less than two brakemen on every freight and yard crew. The

[1] Section 6 provides in part:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions . . . ."

Railway reciprocated by serving upon the Union a § 6 notice requesting an agreement that would make crew size a matter of managerial judgment. The parties held conferences under § 6 without reaching agreement. The National Mediation Board attempted to mediate the dispute pursuant to § 5, 45 U. S. C. § 155,[2] failed, and proffered arbitration pursuant to the same section. After the Union declined to accept arbitration, the National Mediation Board terminated its jurisdiction. Since no emergency board was appointed by the President under § 10, 45 U. S. C. § 160,[3] after the 30-day cooling-off period of

[2] Section 5, First, provides in part:

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

. . . . . .

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts . . . shall be unsuccessful, the said Board shall at once endeavor as its final required action . . . to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter."

[3] Section 10 provides in part:

"If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. . . .

. . . . . .

"After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

§ 5 had run,[4] the Act's prohibition against resort to self-help measures lapsed.

Thereafter, the Railway brought this action in federal District Court seeking an injunction against a threatened strike, alleging that the Union had not lived up to its obligation under § 2, First, 45 U. S. C. § 152, First, to "exert every reasonable effort" to make and maintain working agreements. Specifically the Railway alleged that the Union had violated its statutory duty in the following ways:

> "First: Having insisted on the foregoing dispute upon bargaining separately with the plaintiff carrier instead of bargaining jointly with all the railroads upon which the BRT [Brotherhood of Railroad Trainmen] had served like notices, nevertheless
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> "(a) The defendant has refused to bargain on the proposals in the carrier's counter-notices to reduce the size of main line road crews;
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> "(b) The defendant has insisted that any agreement on the C&NW be no more favorable to the C&NW than agreements reached on the other railroads upon which the BRT served like notices;
>
> "(c) The defendant has entered negotiations with a fixed position and a determination not to deviate from the position regardless of what relevant consideration might be advanced by the C&NW; and
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> Second: Notwithstanding the foregoing, the defendant has refused to engage in national handling

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[4] Section 5, First, provides in part:

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

of this dispute and to negotiate on a joint basis a national crew consist agreement with all the railroads on which the BRT served like notices." App. 7.

The District Judge denied the injunction holding that "[w]hether there has been compliance with Section 2 First . . . is a matter for administrative determination . . . is not justiciable and this Court does not have jurisdiction to consider or adjudicate disputes with respect to compliance with such subsection . . . ." App. 204–205. The Court of Appeals affirmed, 422 F. 2d 979 (CA7 1970). We granted certiorari, 400 U. S. 818 (1970), to resolve a conflict in the circuits. *Piedmont Aviation, Inc.* v. *Air Line Pilots Assn.*, 416 F. 2d 633 (CA4 1969). I believe that the Railway Labor Act evidences a clear intention to prohibit courts from weighing the relative merits of each party's attempts to reach a bargaining agreement, and that the decision of the Seventh Circuit should, therefore, be affirmed.

This case presents the question whether, in a major dispute, a District Court may enjoin self-help measures after the completion of the statutory procedures if it determines that a party has not made "every reasonable effort" to reach agreement as required by § 2, First. Underlying this question is the corollary one to what extent a District Court may inquire into collective negotiations in determining whether a party has complied with its statutory duty.

In answering these questions particular attention must be paid to the legislative history of the Railway Act. Railway labor dispute-settlement law has undergone a long legislative evolution which this Court has previously explored. *Machinists* v. *Street*, 367 U. S. 740, 750–760 and nn. 10–12 (1961); see also *Texas & N. O. R. Co.* v.

Railway Clerks, 281 U. S. 548 (1930); *Virginian R. Co.* v. *System Federation No. 40*, 300 U. S. 515 (1937); *Union Pacific R. Co.* v. *Price*, 360 U. S. 601 (1959); *Detroit & T. S. L. R. Co.* v. *United Transportation Union*, 396 U. S. 142 (1969). Much of the experimentation prior to passage of the Railway Labor Act of 1926 proved unsuccessful. Recognition that growing unrest in the railway industry had created a situation with potentially grave public consequences, led the President, in three messages to Congress between 1923 and 1925, and both the Republican and Democratic Parties, in 1924, to call for unprecedented cooperation between carriers and unions. H. R. Rep. No. 328, 69th Cong., 1st Sess., 2–3 (1926); S. Rep. No. 606, 69th Cong., 1st Sess., 2–3 (1926); Hearing on H. R. 7180 before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess., 21–22, 90, 98, 197 (1926) (hereinafter Hearings). These basically antagonistic forces were urged to sit down and develop a workable solution for settling disputes in their industry in order to minimize the rupture of the public services that they provided. The legislative product devised by the parties themselves, which Congress enacted in 1926 as the Railway Labor Act, 44 Stat. 577, was a unique blend of moral and legal duties looking toward settlement through conciliation, mediation, voluntary arbitration, presidential intervention, and finally, in case of ultimate failure of the statutory machinery, resort to traditional self-help measures. The cooperation involved was unparalleled in this country's labor history. It was felt significant to all involved that the parties themselves had worked out a solution and had presented it to Congress.[5]

[5] "Mr. Richberg: . . . This bill which has been introduced in the House and in the Senate simultaneously represents the product of months of negotiations and conferences between the representatives of 20 railroad labor organizations and the Association of Rail-

The significance lay in the fact that since the bill represented "the agreement of the parties . . . they will be under the moral obligation to see that their agreement accomplishes its purpose, and that if enacted into law they will desire to prove the law a success." Hearings, *supra*, at 21.

The outstanding feature of the bill was that it was voluntary—Congress, the carriers, and the unions all recognized that there were very few enforceable provisions, and still fewer judicially enforceable ones.[6] In

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way Executives representatives, representing the great majority, practically all, of the carriers by railroad." Hearings, *supra*, at 9.

"I want to emphasize again that this bill is the product of a negotiation between employers and employees which is unparalleled, I believe, in the history of American industrial relations.

"For the first time representatives of a great majority of all the employers and all the employees of one industry conferred for several months for the purpose of creating by agreement a machinery for the peaceful and prompt adjustment of both major and minor disagreements that might impair the efficiency of operations or interrupt the service they render to the community. They are now asking to have this agreement written into law, not for the purpose of having governmental power exerted to compel the parties to do right but in order to obtain Government aid in their cooperative efforts and in order to assure the public that their interest in efficient continuous transportation service will be permanently protected.

. . . . . .

"It is a remarkable fact that all parties concerned were able to lay aside the hostile feelings and suspicions that had too often characterized past negotiations and to act upon the belief that if an agreement were reached, it would be carried out in the same spirit of good faith and fair dealing that characterized the negotiations." Hearings, *supra*, at 21–22.

[6] Mr. Thom (carrier representative). "I wish you to bear that fact in mind—the moral obligation now resting upon each one of the proponents of this bill in respect to its effect upon the public interest. Suppose it is changed in any important particular, what

testimony before Congress, Mr. Richberg, the major spokesman for the unions, stated, "our thought has been in this law not to write a lot of statute law for the courts to enforce. . . . We expect that most of the provisions of this bill are to be enforced by the power of persuasion, either exercised by the parties themselves or by the Government board of mediation representing the public interest." Hearings, *supra*, at 65–66. Congress recognized the absence of coercive measures but chose not to add them, noting that "it is in the public interest to permit a fair trial of the method of amicable adjustment agreed upon by the parties . . . ." S. Rep. No. 606, 69th Cong., 1st Sess., 4 (1926). Thus, the history of the Act reveals that in dealing with major disputes Congress was content to enact a machinery which dragged on, with cooling-off periods and various status quo restrictions, while the parties were required to "treat with" one another, § 2, Ninth, 45 U. S. C. § 152, Ninth, in the hope that ultimately they would voluntarily reach agreement.

In order to bring about settlement, it was made "the duty of all carriers . . . and employees to exert every reasonable effort to make and maintain agreements . . . in order to avoid any interruption to commerce . . . ." Section 2, First, 45 U. S. C. § 152, First. From the outset, Congress was interested in the meaning of this provision and whether this statutory duty was viewed

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effect will that have upon the moral obligation to which I have just alluded? . . .

"I personally attach most substantial importance to the view I am now asking you to consider. I think that when a measure is adopted, backed by the moral obligation of the parties that it will not be permitted in any degree to [a]ffect adversely the public interests, it would be a most unwise thing to insert measures of coercion, substitute principles, or anything that would have the effect of liberating these parties from the position they have voluntarily assumed before you, that this is a workable measure." Hearings, *supra*, at 115.

by the drafters to be a judicially enforceable one. During the hearings on the House bill the following colloquy occurred:

> "Mr. Huddleston. Now, referring to section 2 on page 3, ['] it shall be the duty of all carriers, their officers, agents, and employees, to exert every reasonable effort to make and maintain agreements,' etc. Do you agree that that also is unenforceable by judicial proceeding?
>
> "Mr. Richberg. Not always. I think any action involving an arbitrary refusal to comply with that duty might be subject to judicial compulsion. I am sure it would work both ways.
>
> . . . . .
>
> "In other words, I think it would not be exerting a reasonable effort to make and maintain agreements, for a carrier or its appropriate officers to refuse to even meet a committee that sought to make an agreement.
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> . . . . .
>
> "Mr. Huddleston. You think, then, that this section is enforceable?
>
> "Mr. Richberg. I think that a duty imposed by law is enforceable by judicial power, yes. Of course, this is not a duty which could be enforced in a very absolute way, because it is a duty to exert every reasonable effort. In other words, all that could be enforced by the court would be an order against an arbitrary refusal to even attempt to comply with that duty, but I believe that could be subject to judicial power." Hearings, *supra*, at 84–85.

In response to an earlier question Mr. Richberg had testified:

> "Mr. Richberg. In the first place, I think if either party showed a willful disregard of the funda-

mental requirements, that they should make every reasonable effort to make an agreement—in other words, if they refuse absolutely to confer, to meet or discuss or negotiate, I think there is a question as to whether there might not be invoked some judicial compulsion, but I would rather see that left to development rather than see it written into the law. But outside of that, if the parties do not make an agreement, I think you face this question, first, as to whether the Government board of mediation could bring them to see the error of their ways; and, second, if that effort was unsuccessful, whether they could bring them to refer that dispute to an arbitration, and then if it was of sufficient magnitude so that it actually affected commerce substantially, whether the emergency board could not itself bring about an adjustment." Hearings, *supra*, at 66.

Since the Act was the product of months of discussion between the carriers and unions and since Mr. Richberg's testimony was uncontradicted by the representatives of the carriers,[7] it seems fair to say that the above testimony evidences an understanding on the part of the unions, carriers, and Congress that the duty "to exert every reasonable effort" was judicially enforceable at least to the extent of requiring the parties to sit down at the bargaining table and talk to each other. This is exactly what this Court held in *Virginian R. Co.* v. *System Federation No. 40*, 300 U. S. 515 (1937). That case was an equitable action brought by the Federation to force the Railway to bargain with it. The carrier, despite the Board of Mediation's certification of the Federation as the bargaining agent of the employees, had continued to deal only with its company union.

[7] Carrier representatives were present throughout the congressional testimony of Mr. Richberg. None contradicted Mr. Richberg's viewpoint in their testimony.

This Court held that the duty to exert every reasonable effort to reach agreement, which had been held to be without legal sanction in the context of the previous act, *Pennsylvania R. Co.* v. *Labor Board*, 261 U. S. 72 (1923),

> "no longer stand[s] alone and unaided by mandatory provision . . . . The amendment of the Railway Labor Act added new provisions in § 2, Ninth, makes it the duty of the Mediation Board, when any dispute arises among the carrier's employees, 'as to who are the representatives of such employees,' to investigate the dispute and to certify . . . the name of the organization authorized to represent the employees. It commands that 'Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act.'
>
> "It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts." 300 U. S., at 544.
>
> ". . . [W]e cannot assume that its [§ 2, Ninth's] addition to the statute was purposeless . . . . The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First." *Id.*, at 547–548.

Virginian R. Co. stands, then, for the proposition that once the Board has certified a union as the bargaining

agent of the employees, a court may require the employer to "treat with" that representative in order that the statutory machinery of the Railway Labor Act be given a chance to bring about a voluntary settlement. It is, in essence, an order for the parties to recognize one another and *begin* the long, drawn-out statutory bargaining process.

In the years since *Virginian R. Co.* this Court, in the context of a major dispute, has authorized the issuance of an injunction in only two other carefully limited classes of railway litigation—those seeking to prevent invidious discrimination on the part of a union as against employees and those seeking to prevent violation of the Act's status quo provisions during bargaining. In a series of cases beginning with *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192 (1944),[8] this Court has held that "the language of the Act to which we have referred [§§ 1, Sixth; 2, Second, Third, Fourth, and Ninth], read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." *Id.*, at 202–203. Recently, in *Detroit & T. S. L. R. Co.* v. *United Transportation Union*, 396 U. S. 142 (1969), this Court held that the Act's status quo requirement, which "is central to its design," could be enforced by judicial authority. *Id.*, at 150. While in each of these instances the Court found specific, positive statutory mandates for judicial interference, the underlying cohesiveness of the decisions lies in the fact that in each instance the scheme of the Railway Labor Act

[8] See also *Tunstall* v. *Locomotive Firemen*, 323 U. S. 210 (1944); *Graham* v. *Locomotive Firemen*, 338 U. S. 232 (1949); *Trainmen* v. *Howard*, 343 U. S. 768 (1952).

could not begin to work without judicial involvement. That is, unless the unions fairly represented all of their employees; unless the employer bargained with the certified representative of the employees; unless the status quo was maintained during the entire range of bargaining, the statutory mechanism could not hope to induce a negotiated settlement. In each case the judicial involvement was minimal and in keeping with the central theme of the Act—to bring about voluntary settlement. In each case the "collective bargaining agents stepped outside their legal duties and violated the Act which called them into being . . . ." *Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330, 338 (1960).

In the instant case, we have an entirely different situation. Here, all parties were fairly represented, the status quo was being maintained, and most important, each bargaining representative met and conferred with his counterpart. The step-by-step procedures prescribed by the Railway Labor Act had been carried through. In essence, the Court holds that a district court has the duty under § 2, First, to assess the bargaining tactics of each of the parties *after* the entire statutory scheme has run its course. If then, the court determines that a party had not exerted sufficient effort to reach settlement, it should enjoin self-help measures, and, if such action is to make any sense within this statutory scheme, remand the parties to some unspecified point in the bargaining process. Such a notion is entirely contrary to the carefully constructed premise of the Railway Labor Act.

My summary of the legislative history of the Act clearly discloses that judicial involvement in the railway bargaining process was to be miniscule since the entire focus of the Act was toward achieving a voluntary settlement between the protagonists. "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or

working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them." *Terminal Assn.* v. *Trainmen*, 318 U. S. 1, 6 (1943) (footnote omitted). It is clear to me that the duty to exert every reasonable effort was agreed upon to make effective the duty of the carrier to recognize the union chosen by the employees—in other words, it is essentially a corollary of the duty. Such a duty does not contemplate that governmental power should, after failure of the parties to reach accord, be added to the scales in favor of either party and thus compel the other to agree upon the aided party's terms. Rather, at that point, impasse was to free both parties to resort to self-help. See *NLRB* v. *Insurance Agents*, 361 U. S. 477, 484–486 (1960). As Mr. Richberg had testified, "I wish to stress that one point above all others. We are seeking an opportunity to preserve self-government in industry. . . . We are not asking the Government to use force against one or the other party. We are simply asking aid and cooperation." Hearings, *supra*, at 22.

Even apart from what the drafters of the Act representing both sides specifically contemplated, the result reached today will destroy entirely the carefully planned scheme of the Act. The Act is built upon a step-by-step framework. Each step is carefully drawn to introduce slightly different pressures upon the parties to reach settlement than the preceding step. First, the parties confer jointly. Next, the National Mediation Board may add its pressure through mediation. Then, the President may call into effect both the great power of his office and that of informed public opinion through the creation of an emergency board. Underlying the entire statutory framework is the pressure born of the knowledge that in the final instance traditional self-help economic pressure may be brought to bear if the statutory mechanism does not produce agreement. The

Act does not evidence an intention to return to any step once completed. The Court's decision will effectively destroy the scheme of gradually escalating pressures. Moreover, the Court provides absolutely no guidance as to where in the bargaining scheme the parties are to be remanded. Does the court send them back to the Mediation Board which has already terminated jurisdiction finding the parties to have reached impasse? Should the court remand to some other phase of the proceedings? If so, where?

More important, however, is the mortal wound today's holding inflicts on the critical role to be played by the presence of economic weapons in reserve. *NLRB* v. *Insurance Agents, supra,* at 488–489. As the statutory machinery nears termination without achieving settlement, the threat of economic self-help and the pressures of informed public opinion create new impetus toward compromise and agreement. If self-help can now effectively be thwarted by injunction and by drawn-out court proceedings after the termination of the entire bargaining process, or worse yet, at each step thereof, the threat of its use becomes impotent, indeed.

Since there is no specific mandate for an injunction in the circumstances presented by this case, the more general provisions of the Norris-LaGuardia Act are applicable. *Virginian R. Co.* v. *System Federation No. 40,* 300 U. S., at 563; *Trainmen* v. *Chicago R. & I. R. Co.,* 353 U. S. 30, 40–41 (1957).

> "The Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §§ 101–115, expresses a basic policy against the injunction of activities of labor unions. We have held that the Act does not deprive the federal courts of jurisdiction to enjoin compliance with various mandates of the Railway Labor Act. *Virginian R. Co.* v. *System Federation,* 300 U. S. 515; *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen,*

338 U. S. 232. However, the policy of the Act suggests that the courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right." *Machinists* v. *Street*, 367 U. S., at 772–773.

My conclusion, then, is that the Railway Labor Act as designed by its coframers and as enforced by this Court excludes any role for the judiciary to oversee the relative efforts of the parties in their mutual attempt to reach settlement. A court may order the parties to recognize one another and sit down to bargain, but upon failure of the statutory machinery to induce settlement, the judiciary is denied power to enjoin resort to traditional self-help measures. If this scheme has proved ineffective, Congress not this Court must redress the deficiencies.

I would affirm.